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# THE CONSTITUTIONAL FUTURE OF RACE-NEUTRAL EFFORTS TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS

KIMBERLY JENKINS ROBINSON\*

**Abstract:** In 2007, the U.S. Supreme Court ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* that the racial classifications used by school districts in Seattle and Louisville to create diverse schools were unconstitutional. Justice Kennedy provided the deciding vote but also noted that school districts could pursue diversity and avoid racial isolation through race-neutral alternatives. He asserted that it was unlikely that race-neutral alternatives would be subject to strict scrutiny but articulated no rationale for this assertion. This Article argues that, after *Parents Involved*, school districts will focus on race-neutral efforts to create diverse schools because the decision leaves very little room for racial classifications that would survive strict scrutiny. This Article further contends that governments should be given wide latitude to adopt race-neutral efforts to avoid racial isolation and create diverse schools because these efforts will help school districts accomplish the goals of the Equal Protection Clause while avoiding many of the potential harms of racial classifications. In light of how *Parents Involved* will push districts to focus on race-neutral efforts to achieve diversity and avoid racial isolation, this Article confronts the key issues that will determine the future of efforts to provide diverse elementary and secondary schools.

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*This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.*

—Justice Kennedy, concurring in part and concurring in the judgment, in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>1</sup>

## INTRODUCTION

Racial isolation in public schools has increased in recent years.<sup>2</sup> At the same time, five justices on the Supreme Court of the United States recently reaffirmed the importance of racially integrated elementary and secondary schools and viewed as compelling interests “avoiding racial isolation” and “achiev[ing] a diverse student population.”<sup>3</sup> In the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*, however, the Court held that the race-based student assignment plans adopted by the school boards in Seattle, Washington, and Louisville, Kentucky, to promote racial integration violated the Equal Protection Clause because they were not narrowly tailored.<sup>4</sup> The decision will influence the future actions of many schools districts because “[h]undreds of school districts across the country have adopted some variation of these plans . . . .”<sup>5</sup> Although the Court held the plans unconstitutional, Justice Kennedy, in a concurring opinion, heralded the paramount importance of the unfinished national agenda of ensuring equal educa-

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<sup>1</sup> 127 S. Ct. 2738, 2797 (2007).

<sup>2</sup> See GARY ORFIELD & CHUNGMEI LEE, THE HARVARD CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 14 (2007). This Article adopts the federal definition of racial isolation, whereby a school is racially isolated if more than fifty percent of its enrolled students are minorities. See 34 C.F.R. § 280.4 (2008).

<sup>3</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and in the judgment); *id.* at 2835 (Breyer, J., dissenting).

<sup>4</sup> *Id.* at 2759–60 (majority opinion).

<sup>5</sup> Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court's Integration Decision*, 89 PHI DELTA KAPPAN 178, 178 (2007); see also RICHARD D. KAHLBERG, THE CENTURY FOUND., RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 42 (2007) (noting that “[i]t is estimated that hundreds of school districts now use race in student assignment” and that “many districts have adopted race-conscious student assignment plans voluntarily, and these are the districts which may wish to look for a viable race-neutral alternative”). But see James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007) (“The truth is that racial integration is not on the agenda of most school districts and has not been for over twenty years.”).

tional opportunity and an integrated nation.<sup>6</sup> Justice Breyer, along with three additional members of the Court, noted the many remedial, educational, and democratic interests promoted by the racial integration of schools.<sup>7</sup>

Despite the *Parents Involved* decision, many school districts remain committed to pursuing diversity and avoiding racial isolation.<sup>8</sup> Although no one has calculated the exact number of districts that consider race in student assignments, in 2007 education scholars estimated that between 100 and 1,000 districts consider race in some manner to determine where children attend school.<sup>9</sup> The overwhelming majority of the nation's school districts do not consider race in student assignments; however, the efforts of the hundreds of school districts that presently pursue racial integration will undoubtedly impact the lives of a significant number of schoolchildren, even if only some of those districts continue their efforts after *Parents Involved*.<sup>10</sup> In fact, recent evidence indicates that, although some districts abandoned efforts to promote diversity after the *Parents Involved* decision, many school districts continue to pursue diversity but have adjusted their approach to doing so.<sup>11</sup> Furthermore, educators continue to try to comprehend the ruling and its implications for the legality of student assignment plans that seek to promote diversity and avoid racial isolation.<sup>12</sup> Moreover, surveys reveal that a substantial majority of Americans favor diverse schools over segregated schools and believe that the government should take additional steps to create diverse schools.<sup>13</sup>

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<sup>6</sup> *Parents Involved*, 127 S. Ct. at 2791–92, 2797 (Kennedy, J., concurring in part and in the judgment).

<sup>7</sup> *Id.* at 2820–22 (Breyer, J., dissenting).

<sup>8</sup> See, e.g., KAHLBERG, *supra* note 5, at 42 (noting that “across the country, school districts are not giving up” on racial integration); Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WK., July 18, 2007, at 1 (quoting an attorney for numerous school boards who stated that “she was hearing a commitment [from school districts] to do whatever could pass legal muster to keep schools racially diverse”).

<sup>9</sup> Ryan, *supra* note 5, at 144; see also Richard D. Kahlenberg, *A New Way on School Integration*, CENTURY FOUNDATION ISSUE BRIEF (Century Found., New York, N.Y.), Nov. 28, 2006, at 1, available at <http://www.tcf.org/publications/education/schoolintegration.pdf> (citing Sam Dillon, *Schools' Efforts Hinge on Justices' Ruling in Cases on Race and School Assignments*, N.Y. TIMES, June 24, 2006, at 11); Amit R. Paley & Brigid Schulte, *Court Ruling Likely to Further Segregate Schools, Educators Say*, WASH. POST, June 30, 2007, at A4.

<sup>10</sup> Ryan, *supra* note 5, at 146.

<sup>11</sup> See Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § MM, at 38; Susan Eaton, *Diversity's Quiet Rebirth*, EDUC. WK., Aug. 18, 2008, <http://www.edweek.org/ew/articles/2008/08/18/01eaton-com.html>.

<sup>12</sup> See Eaton, *supra* note 11.

<sup>13</sup> See *id.*

School districts may seek to reduce racial isolation and create diverse schools by adopting one of two approaches. The first, referred to herein as a race-neutral approach, involves a student assignment plan that does not classify individual students on the basis of race but instead seeks to pursue diversity or avoid racial isolation through indirect means. Examples of such efforts include (1) student assignment plans that integrate based on socioeconomic status, (2) drawing school attendance zones to bring diverse groups together, and (3) offering magnet programs. The second approach uses an express racial classification to assign some students to schools.

Districts that pursue the second approach must develop a student assignment plan that is consistent with the requirements set forth in *Parents Involved*. Justice Kennedy's opinion, which has been described as the opinion that will determine the future of school integration,<sup>14</sup> affirms that the Equal Protection Clause does not necessarily preclude elementary and secondary schools from considering race as one factor among many when assigning students to schools.<sup>15</sup> Nevertheless, some have speculated that districts that continue to use racial classifications will face great difficulty in interpreting and satisfying *Parents Involved*.<sup>16</sup> This Article demonstrates how *Parents Involved* and the Supreme Court's requirements for strict scrutiny make any consideration of race in student assignments so difficult and impractical that very few districts, if any, are likely to choose to continue to consider the race of individual students when they assign students to schools.

The narrow legal avenue available for using a racial classification will encourage those districts that want to create diverse schools and avoid racial isolation to adopt a race-neutral approach. Some districts have implemented new student assignment plans that adopt a race-neutral approach. For instance, in May 2008, the Jefferson County

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<sup>14</sup> Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 735 (2008).

<sup>15</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment).

<sup>16</sup> See, e.g., Craig R. Heeren, "Together at the Table of Brotherhood": Voluntary Student Assignment Plans and the Supreme Court, 24 HARV. BLACKLETTER L.J. 133, 165-66, 175 (2008); Ryan, *supra* note 5, at 138; Walsh, *supra* note 8, at 1 (noting that one advocate for urban districts contended that districts face slim prospects for pursuing diversity and that "[f]or all intents and purposes, the court said that you can use race, but we dare you to come up with a solution that passes muster" (internal quotation marks omitted)). Some even contend that *Parents Involved* prohibits the use of a racial classification in voluntary student assignment plans. See, e.g., Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 494 (2008).

School Board in Louisville, Kentucky, whose plan was invalidated in *Parents Involved*, voted unanimously to approve a new student assignment plan that seeks to maintain the district's racial and economic diversity.<sup>17</sup> The plan divides the district into two zones based upon the racial composition, income, and educational level of the neighborhoods.<sup>18</sup> Traditional elementary schools will not be permitted to enroll less than 15 percent or more than 50 percent of students from neighborhoods with a higher percentage of minorities than the district-wide average and with education and income levels below the district-wide average.<sup>19</sup> The plan also seeks to ensure students receive a similar educational experience at each school by providing "substantially uniform educational resources to all schools."<sup>20</sup> The plan will take effect for the 2009–2010 school year and applies to students in grades one through twelve, with limited exceptions.<sup>21</sup> Prior to *Parents Involved*, some districts already had adopted race-neutral efforts to avoid racial isolation and achieve diversity. For example, the approach proposed in Louisville resembles the student assignment plan used in Berkeley, California.<sup>22</sup> The school district in Wake County, North Carolina, likewise uses a socioeconomic integration plan to promote integration and diversity.<sup>23</sup>

Such efforts may face increased legal pressure after the *Parents Involved* decision.<sup>24</sup> Consider that, in Milton, Massachusetts, the school district recently adopted a plan that redrew student attendance boundaries for its elementary schools.<sup>25</sup> The plan sought to address the

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<sup>17</sup> Antoinette Konz & Chris Kenning, *Desegregation: The New Proposal; Jefferson Schools Unveil Plan to Keep Diversity*, COURIER-JOURNAL (Louisville, Ky.), Jan. 29, 2008, at A1; Jefferson County Public Schools, About Us, It's Unanimous! School Board Votes to Approve New Assignment Plan, <http://www.jefferson.kyschools.us/aboutus/studentassignplan.html> (last visited Feb. 18, 2009).

<sup>18</sup> Konz & Kenning, *supra* note 17; Jefferson County Pub. Sch., *supra* note 17.

<sup>19</sup> Konz & Kenning, *supra* note 17; Jefferson County Pub. Sch., *supra* note 17 (noting that the student assignment plan will not apply to special or alternative schools).

<sup>20</sup> Jefferson County Pub. Sch., *supra* note 17.

<sup>21</sup> *Id.* (identifying schools to which the plan does not apply and highlighting that the superintendent will seek approval for additional recommendations for middle and high schools).

<sup>22</sup> Konz & Kenning, *supra* note 17. The current and past efforts to integrate the schools in Berkeley, California, are explained at the school district's website at <http://www.berkeley.net/index.php?page=student-assignment-plan>.

<sup>23</sup> KAHLENBERG, *supra* note 5, at 3, 8, 10 (noting that approximately forty school districts are pursuing class integration in student assignment and that one of the primary reasons that school districts adopt such plans is because class integration "can often produce a fair amount of racial integration").

<sup>24</sup> See Joseph Pereira, *School Integration Efforts Face Renewed Opposition—Supreme Court Ruling Sways Milton Battle; Off to Private School*, WALL ST. J., Oct. 11, 2007, at A1.

<sup>25</sup> *Id.*

achievement gap between African American and white children in the district by better integrating the schools.<sup>26</sup> Some parents responded with hostility to the plan and are exploring their options for suing the district over the plan.<sup>27</sup> Similarly, some parents in the Bibb County School District, which encompasses Macon, Georgia, threatened legal action against the district for a school redistricting plan that seeks to integrate the schools.<sup>28</sup> Parents in both communities point to *Parents Involved* decision as providing a strong legal basis for their suit.<sup>29</sup>

Districts that implement a race-neutral student assignment plan will face an uncertain legal terrain about how such efforts will be scrutinized. Justice Kennedy in *Parents Involved* asserted that "it is unlikely" that these approaches would be subject to strict scrutiny because they do not treat students differently on the basis of a racial classification.<sup>30</sup> He did not, however, articulate a theory for why these efforts will not be subject to strict scrutiny, nor did he indicate the appropriate standard of review for these plans.<sup>31</sup>

Legal opinion on the legality of these plans currently appears mixed. Although proponents contend that race-neutral plans are constitutional because they do not rely on the race of individual students,<sup>32</sup> opponents argue that such plans are unconstitutional because they use other factors as a proxy for race.<sup>33</sup> *Parents Involved* has galvanized the latter group, which claims the case as support for invalidating such plans.<sup>34</sup> Scholars also disagree over how the Court will review race-neutral efforts.<sup>35</sup> Justice Kennedy's statement in *Parents Involved* that

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Pereira, *supra* note 24.

<sup>30</sup> 127 S. Ct. at 2792 (Kennedy, J., concurring in part and in the judgment).

<sup>31</sup> See *id.* Justice Kennedy did provide some insights on this issue by citing to a voting rights decision. See *id.* (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996)). This Article explains the insights that may be drawn from this citation. See *infra* notes 473-477 and accompanying text.

<sup>32</sup> See Konz & Kenning, *supra* note 17; see also KAHLENBERG, *supra* note 5, at 3 ("Although the Court struck down plans in Louisville and Seattle, which used race as a factor in student assignment, it is clear that using a race-neutral alternative—such as family income—is perfectly legal.").

<sup>33</sup> See Konz & Kenning, *supra* note 17.

<sup>34</sup> See *id.* (noting that the attorney who challenged the Louisville plan contends that the plan is unconstitutional); Pereira, *supra* note 24.

<sup>35</sup> Compare Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. OF RACE & L. 277, 279-80 (2007) (arguing that strict scrutiny applies to race-neutral government action), and Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2347-48 (2000) (arguing

strict scrutiny may not apply to race-neutral efforts,<sup>36</sup> along with the four dissenting justices' view that a less demanding standard than the traditional understanding of strict scrutiny should have applied to the Seattle and Louisville student assignment plans,<sup>37</sup> indicates that the appropriate legal standard for analyzing race-neutral efforts to achieve diversity and avoid racial isolation remains far from resolved. For those districts that remain committed to diverse schools, resolution of the applicable legal standard for race-neutral efforts will determine whether they continue the battle for integration or must waive the white flag of defeat. Moreover, the issue of how to integrate public schools will grow in importance in the coming years as minority students soon will make up more than 40 percent of the school-age population and as African American and Latino students increasingly attend suburban schools that previously had not been responsible for educating such students.<sup>38</sup> Furthermore, the decision on the appropriate standard of review will guide how courts analyze the full array of race-neutral government action, including efforts in employment, the criminal justice arena, housing, and so on.<sup>39</sup>

This Article contends that governments should be given wide latitude to adopt race-neutral efforts to avoid racial isolation and create diverse schools because these efforts will help districts ensure the substantive equality that the Equal Protection Clause was meant to accomplish while avoiding many of the harms of racial classifications. There-

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that past precedent will likely lead courts to apply strict scrutiny to race-conscious efforts to increase the number of minority students admitted to a university), *with* R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 578 (2003) ("There is ample reason to conclude, however, that the Court would not apply strict scrutiny to race-neutral policies intended to benefit disadvantaged racial minorities."), and Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1054 (1998) (asking whether "the goal of increasing racial diversity [should] trigger constitutional skepticism when decoupled from race-specific means" and responding that "[s]trong arguments suggest that it should not. . . . [R]ace-neutral proxy devices for seeking racial diversity should not be understood at the outset as implicating a racially discriminatory purpose").

<sup>36</sup> 127 S. Ct. at 2792 (Kennedy, J., concurring in part and in the judgment).

<sup>37</sup> *Id.* at 2819 (Breyer, J., dissenting) ("I believe that the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word, although it does require the careful review I have just described.").

<sup>38</sup> See Wells & Frankenberg, *supra* note 5, at 187 (citing NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUC. STATISTICS 72 tbl.40 (2006), available at [http://nces.ed.gov/ipeds/data/digest/d06/tables/dt06\\_040.asp](http://nces.ed.gov/ipeds/data/digest/d06/tables/dt06_040.asp)).

<sup>39</sup> See Banks, *supra* note 35, at 581; see also Forde-Mazrui, *supra* note 35, at 2334.



fore, Justice Kennedy correctly asserted in *Parents Involved* that strict scrutiny should not be applied to race-neutral measures.<sup>40</sup>

This Article develops this argument in three parts. Part I explains how districts that want to harness the benefits of diverse school settings<sup>41</sup> and avoid the harms of racial isolation have very little opportunity after *Parents Involved* to consider the race of individual students when assigning students to schools.<sup>42</sup> Part II explores the legal and scholarly landscape on how race-neutral actions should be treated and explains why strict scrutiny should not be applied to these actions, as Justice Kennedy correctly suggested in *Parents Involved*.<sup>43</sup> Part III examines the competing understandings of the purpose and scope of the Equal Protection Clause and argues that an antisubordination interpretation of this clause should guide its application.<sup>44</sup> It then reviews the evidence on the harms of racial isolation and the benefits of integration and argues that racial isolation has a subordinating effect while integration can help to remedy that effect.<sup>45</sup> Next, it identifies the harms and costs associated with a racial classification and explains why a race-neutral approach avoids most of these harms.<sup>46</sup> It argues that race-neutral efforts to create diverse schools and avoid racial isolation can help governments fulfill one of the central goals of the Equal Protection Clause while avoiding most of the harms of racial classifications. Thus, it concludes that the law should provide ample room for school districts to adopt these efforts.<sup>47</sup> To accomplish this, courts should apply a meaningful interpretation of rational basis review to student assignment plans that have the benign purpose and effect of avoiding racial isolation and advancing diversity.<sup>48</sup>

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<sup>40</sup> See 127 S. Ct. at 2792.

<sup>41</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 219 (1998) ("[D]iversity extends well beyond race and encompasses differences in background, socioeconomic status, country or region of birth, point of view, and religion."); NAT'L ACAD. OF EDUC., *RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES* 8 (Robert L. Linn & Kevin G. Welner eds., 2007).

<sup>42</sup> See *infra* notes 49–114 and accompanying text.

<sup>43</sup> See *infra* notes 115–226 and accompanying text.

<sup>44</sup> See *infra* notes 233–307 and accompanying text.

<sup>45</sup> See *infra* notes 308–417 and accompanying text.

<sup>46</sup> See *infra* notes 418–461 and accompanying text.

<sup>47</sup> See *infra* note 460 and accompanying text.

<sup>48</sup> See *infra* notes 462–503 and accompanying text.

# I. HOW PARENTS INVOLVED VIRTUALLY CLOSED THE DOOR ON RACIAL CLASSIFICATIONS IN STUDENT ASSIGNMENT PLANS

For those districts that want to reap the benefits of avoiding racial isolation and creating diverse schools, *Parents Involved* virtually closes the door on the use of the race of individual students to make student assignments to schools.<sup>49</sup> In that case, both the Seattle and Louisville plans at issue sought to keep the racial composition of some schools within a specific range tied to their respective districts' racial compositions.<sup>50</sup> The Court held that neither a remedial interest nor the interest in creating a diverse student body, which the Court held to be compelling in higher education in the 2003 case of *Grutter v. Bollinger*,<sup>51</sup> could justify the Louisville or Seattle student assignment plans.<sup>52</sup> The Court further held that the Seattle and Louisville student assignment plans failed two of the narrow tailoring requirements of strict scrutiny.<sup>53</sup> First, both plans affected the attendance location of only a small number of students.<sup>54</sup> As a result, the Court rejected the districts' assertions that the plans were necessary to achieve their objectives because the plans' racial classifications had a minimal impact on school enrollment.<sup>55</sup> Instead, the plans' limited impact indicated that alternative approaches would accomplish the same goals.<sup>56</sup> Second, the districts failed to demonstrate that they had examined race-neutral alternatives to the racial classifications.<sup>57</sup> Therefore, the plans were unconstitutional.<sup>58</sup>

Before turning to the Court's challenging interpretation of the narrow tailoring requirements, it is worth noting that, after *Parents Involved*, districts that seek to integrate their schools currently stand on

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<sup>49</sup> See 127 S. Ct 2738, 2751–54, 2759–61 (2007).

<sup>50</sup> *Id.* at 2746. The plaintiffs in *Parents Involved* challenged a plan for assigning students to Seattle's high schools under which entering ninth grade students ranked their high school preferences from all of the district's high schools. *Id.* at 2746–47. After giving preference to those students with a sibling who attended the school, the district applied a racial tiebreaker that sought to keep each school within ten percentage points of the district's white/nonwhite racial balance of 41 percent white and 59 percent nonwhite. *Id.* at 2747. If a school was not within this range, the district assigned students to the school that resulted in the school reflecting this balance. *Id.* Under the Louisville student assignment plan, all non-magnet schools were required to enroll no fewer than 15 percent black students and no more than 50 percent black students. *Id.* at 2749.

<sup>51</sup> 539 U.S. 306, 328, 334–39 (2003).

<sup>52</sup> *Parents Involved*, 127 S. Ct. at 2752–54.

<sup>53</sup> *Id.* at 2759–61.

<sup>54</sup> *Id.* at 2759–60.

<sup>55</sup> *Id.* at 2760.

<sup>56</sup> *Id.* at 2759.

<sup>57</sup> *Parents Involved*, 127 S. Ct. at 2761.

<sup>58</sup> *Id.* at 2746.

firmer ground on the compelling interest prong of strict scrutiny.<sup>59</sup> Justice Breyer's dissent provided a thoughtful analysis of why the interests of diverse educational settings and avoiding racial isolation are compelling.<sup>60</sup> Justice Kennedy agreed that these interests are compelling.<sup>61</sup> Therefore, five of the current Supreme Court justices (Justice Kennedy and the four dissenting justices) would affirm the compelling nature of these goals.<sup>62</sup>

If the Court later shifts closer to the view held by those in the plurality, however, districts will face a steep uphill, and most likely losing, battle to convince the Court that these interests are compelling. The plurality opinion in *Parents Involved* unequivocally condemned any plans with racial goals linked to the district's demographics.<sup>63</sup> Furthermore, even if districts tie their plans to social science evidence on the benefits of diversity and avoiding racial isolation in the future, they might nonetheless fail to convince the *Parents Involved* plurality that these interests are compelling. The plurality opinion in *Parents Involved* defined the goal of the 1954 Supreme Court case *Brown v. Board of Education*<sup>64</sup> as nonracial student assignments and denounced racial classifications in student assignments as actions that inflict substantial harms on the nation, such as generating hostility and conflict between the races.<sup>65</sup> The plurality embraced the removal of race from government consideration as its "ultimate goal" and criticized racial balancing for preventing government from treating people as individuals.<sup>66</sup> These arguments embrace a colorblind Constitution that would likely reject diversity and avoiding racial isolation as compelling interests. Under a colorblind Constitution, sanctioning these interests as compelling would thwart efforts to eradicate race from government actions and would encourage governments to treat individuals on the basis of race, thereby generating further racial antagonism.<sup>67</sup>

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<sup>59</sup> *Id.* at 2797 (Kennedy, J., concurring in part and in the judgment); *id.* at 2820-24 (Breyer, J., dissenting).

<sup>60</sup> *Id.* at 2820-24 (Breyer, J., dissenting).

<sup>61</sup> *Id.* at 2797 (Kennedy, J., concurring in part and in the judgment).

<sup>62</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment); *id.* at 2835 (Breyer, J., dissenting).

<sup>63</sup> *See id.* at 2757-58 (plurality opinion).

<sup>64</sup> 347 U.S. 483 (1954).

<sup>65</sup> *Parents Involved*, 127 S. Ct. at 2767-68 (plurality opinion).

<sup>66</sup> *Id.* at 2757-58 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion)).

<sup>67</sup> The justices in the plurality need not deny the importance of diversity and avoiding racial isolation in elementary and secondary education to decline to find these interests compelling. Instead, they need only to find that the potential harms of endorsing these

Districts that want to use a racial classification to achieve diversity and to avoid racial isolation will encounter tremendous difficulty satisfying the Court's narrow tailoring requirements, particularly after *Parents Involved*.<sup>68</sup> Even if the Court formally holds that diversity and avoiding racial isolation are compelling interests, the majority's narrow tailoring analysis leaves at best a limited set of circumstances under which districts may adopt a racial classification to achieve these interests.<sup>69</sup> First, the "necessity requirement" represents one of the chief obstacles a district will encounter when it tries to satisfy the narrow tailoring prong of strict scrutiny.<sup>70</sup> In order to show that a racial classification is necessary, a district must prove that it can neither achieve diversity nor avoid racial isolation without the classification.<sup>71</sup> Thus, the necessity requirement dovetails with the requirement that a district show its "serious, good faith consideration of workable race-neutral alternatives."<sup>72</sup> A district could meet this standard by developing careful documentation of the race-neutral options it examined and the ineffectiveness or nonfeasibility of those options in meeting its objectives when compared with a racial classification.<sup>73</sup> *Parents Involved* held that both Seattle and Louisville failed to meet this requirement.<sup>74</sup> While a former superintendent and former president of the school board conceded that the district had not studied or examined race-neutral alternatives, including re-

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goals as compelling outweigh their benefits. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) (rejecting societal discrimination as a compelling interest while recognizing that "[n]o one doubts that there has been serious racial discrimination in this country").

<sup>68</sup> Some scholars correctly anticipated that the narrow tailoring requirements of strict scrutiny would prove too difficult for school districts. See, e.g., Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 638 (2007) ("Navigating the Grutter framework may prove too difficult for public secondary and elementary schools."); David I. Levine, *Public School Assignment Methods After Grutter and Gratz: The View from San Francisco*, 30 HASTINGS CONST. L.Q. 511, 518 (2003) (arguing that, after *Grutter*, districts will have "significant difficulty meeting the narrow tailoring prong of the strict scrutiny analysis").

<sup>69</sup> Even before the *Parents Involved* decision, scholars had argued that plans to integrate elementary and secondary schools should not be subject to the Court's current approach to strict scrutiny. See Archer, *supra* note 68, at 664; James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 339-44 (2006).

<sup>70</sup> See, e.g., *Parents Involved*, 127 S. Ct. at 2759-60.

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 2760 (quoting *Grutter*, 539 U.S. at 339).

<sup>73</sup> *Grutter*, 539 U.S. at 339.

<sup>74</sup> *Parents Involved*, 127 S. Ct. at 2760 (quoting *Grutter*, 539 U.S. at 339).

placing race with class or using a student lottery,<sup>75</sup> Louisville did contend that the board had considered several race-neutral approaches, including a lottery and socioeconomic criterion, and that the board had concluded that the schools would no longer be racially integrated under these approaches.<sup>76</sup> Thus, the judgment in *Parents Involved* sends a message to districts that a thorough review of numerous race-neutral alternatives should be undertaken and that the evidentiary basis for rejecting these alternatives must be identified and recorded.<sup>77</sup>

Even if a district considers race-neutral alternatives, the necessity requirement will create a difficult burden for a school district to meet for several reasons. First, a district must define the racial composition that it requires to achieve the benefits of diversity or to avoid racial isolation.<sup>78</sup> A court would likely require social science evidence to demonstrate that the educational and other benefits that the district seeks to achieve require a specific racial composition or at least some minimal enrollment of students from various racial groups.<sup>79</sup> One difficulty with meeting this standard may be that, although the research shows persuasive evidence of benefits from diversity and avoiding racial isolation when contrasted with racially isolated or nondiverse schools, research does not (yet) establish the composition of students needed to achieve these benefits.<sup>80</sup> Without an understanding of the mix of students that must be brought together to achieve the benefits of diversity or of avoid-

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<sup>75</sup> Joint Appendix at 224a-25a, 253a-59a, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915), available at 2006 WL 2468689.

<sup>76</sup> Brief of Respondent at 3, 8, 47-48, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915), available at 2006 WL 2944684.

<sup>77</sup> See *Parents Involved*, 127 S. Ct. at 2760.

<sup>78</sup> See *Grutter*, 539 U.S. at 335.

<sup>79</sup> See *id.* ("[T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.").

<sup>80</sup> NAT'L ACAD. OF EDUC., *supra* note 41, at 2. The National Academy of Education's report on race-conscious policies noted that the committee on Social Science Research Evidence on Racial Diversity in Schools reviewed the studies cited in the briefs for the *Parents Involved* cases that argued that a minimum percentage of minority enrollment between fifteen to thirty percent would avoid these harms and

determined that the research does not support the conclusion that any particular percent enrollment is sufficient to avoid the harms associated with racial isolation or that there is a specified relationship between increased diversity and educational benefits as the percent moves from 15 to 30 percent [which some *Parents Involved* briefs had argued was sufficient] and beyond.

ing racial isolation, a district will face an almost insurmountable obstacle in proving that a racial classification is necessary in the Court's eyes.<sup>81</sup>

A closely related challenge a district may face in showing that a racial classification is necessary arises from the fact that districts often-times achieve some diversity and avoid some racial isolation from race-neutral efforts.<sup>82</sup> The plurality in *Parents Involved* criticized the Louisville and Seattle districts for just this shortcoming.<sup>83</sup> For example, it disapproved of the use of a racial classification to determine enrollment at one Seattle high school that decreased minority enrollment and increased white enrollment because "[w]hen the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity."<sup>84</sup> The majority similarly condemned both districts' use of racial classifications in student assignments because the districts indicated that the classifications had a minimal impact on diversity and avoiding racial isolation.<sup>85</sup> When a district has achieved some diversity or avoided some racial isolation without a racial classification, it must show why its schools need the additional marginal increase in diversity or the additional ability to avoid racial isolation to achieve its goals.<sup>86</sup>

Even if research does establish the racial composition required to achieve the benefits of diversity or to avoid the harms of racial isolation and the district can establish that a racial classification is necessary to achieve this racial composition, the Court might label the specified levels an unconstitutional quota.<sup>87</sup> Precedent indicates that the Court will not countenance the use of fixed racial goals that establish seats that are

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<sup>81</sup> See *Grutter*, 539 U.S. at 330.

<sup>82</sup> See *Parents Involved*, 127 S. Ct. at 2756 (plurality opinion).

<sup>83</sup> *Id.* ("In each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts.")

<sup>84</sup> *Id.* at 2756–57. The plurality also stated:

[A]t Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian.

*Id.* at 2756.

<sup>85</sup> *Id.* at 2759–60 (majority opinion).

<sup>86</sup> See, e.g., *id.* at 2756–57 (plurality opinion).

<sup>87</sup> See, e.g., *Grutter*, 539 U.S. at 334.

"reserved exclusively for certain minority groups."<sup>88</sup> Therefore, when a school district seeks to establish that its goal of diversity or avoiding racial isolation requires it to consider race in student assignments, it may be caught between the Scylla of insufficient evidence on the racial composition needed to accomplish these goals and the Charybdis of sufficient specificity on these issues that renders its program a quota in the Court's eyes.

To avoid this dilemma, a school district could attempt to chart a course of action based upon the Court's instructions in *Grutter*, in which the Court upheld the University of Michigan Law School's efforts to achieve a critical mass of minority students and rejected arguments that the admissions program operated as a quota.<sup>89</sup> *Grutter* indicates that the Court may approve of "minimum goals for minority enrollment" when those goals embody "a range demarcated by the goal itself."<sup>90</sup> Such goals must operate flexibly and must permit the consideration of competing goals, so that a student that does not further the goals is not foreclosed from enrollment.<sup>91</sup> For example, if a district seeks to achieve diversity in its schools, to show sufficient flexibility in its use of a racial classification the district would be required to undertake a nonmechanical consideration of an array of factors and thus enable all students to be eligible for all seats in a school.<sup>92</sup> Even absent examination of the broad array of factors that define diversity, a district that seeks to avoid racial isolation similarly would need to maintain flexibility in the goals it sets and the operation of its program.<sup>93</sup>

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<sup>88</sup> *Croson*, 488 U.S. at 496; see also *Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (plurality opinion))); *Bakke*, 438 U.S. at 317 (plurality opinion) (criticizing the student admissions plan for the University of California at Davis medical school for preventing whites from competing for seats set aside for minority candidates).

<sup>89</sup> 539 U.S. at 337.

<sup>90</sup> *Id.* at 335 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)) (emphasis omitted); see also Ryan, *supra* note 69, at 340-41 ("The formalistic definition of quotas, in any event, seems merely to require that plans establish rough goals or ranges of permissible enrollments, which most plans already do and which is easy enough to fix in plans that do not").

<sup>91</sup> See *Grutter*, 539 U.S. at 334-35.

<sup>92</sup> See *Parents Involved*, 127 S. Ct. at 2753; *Grutter*, 539 U.S. at 334-35; see also *Parents Involved*, 127 S. Ct. at 2792-93 (Kennedy, J., concurring in part and in the judgment) (noting that racial composition represents only one aspect of a diverse student body).

<sup>93</sup> See Ryan, *supra* note 69, at 340-41 ("The formalistic definition of quotas, in any event, seems merely to require that plans establish rough goals or ranges of permissible

School districts that adopt a racial classification also must be mindful that, although *Parents Involved* held that the Seattle and Louisville student assignment plans were not necessary because they only affected where, a small number or percentage of students attended school,<sup>94</sup> to satisfy the narrow tailoring requirements a district also must prove that its student assignment plan does “not unduly harm members of any racial group.”<sup>95</sup> This requires a district to show that the student assignment plan inflicts “the least harm possible” to those who sought to obtain but ultimately were denied the benefit.<sup>96</sup> A district might address this requirement by distributing the burden of the racial classification fairly evenly among racial groups based on the proportions of each racial group within the district. This could be a difficult requirement to meet, however, if one racial group is more geographically isolated in a district than other groups and thus integrating this group requires it to forego its neighborhood schools and to travel to distant schools more often than other racial groups. Furthermore, many school districts experience substantial disparities in quality between schools. Therefore, once again, a district trying to meet the narrow tailoring requirement could be caught between the rock of showing that its student assignment plan determines where a significant number or percentage of students attends school and the hard place of imposing too great a burden on those who are denied the school of their choice based on race.<sup>97</sup>

Moreover, even if a district desires to implement a plan similar to the one in *Grutter*, it faces substantial difficulty in operationalizing such a plan for elementary and secondary schoolchildren. Like most school districts, those that have implemented voluntary integration plans typically do not assign students on the basis of merit and do not undertake an individualized review of each student (with the exception of a small number of magnet and examination schools).<sup>98</sup> Therefore, school districts would have to overhaul their student assignment policies to undertake the kind of holistic review that the Court upheld in *Grutter*.<sup>99</sup> This would require the expenditure of substantial resources and administrative effort that a school district might not have available in its

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enrollments, which most plans already do and which is easy enough to fix in plans that do not.”).

<sup>94</sup> 127 S. Ct. at 2759–60.

<sup>95</sup> *Grutter*, 539 U.S. at 341.

<sup>96</sup> *Id.* (quoting *Bakke*, 438 U.S. at 308 (plurality opinion)).

<sup>97</sup> *See id.* at 334; NAT’L ACAD. OF EDUC., *supra* note 41, at 2.

<sup>98</sup> *See* Ryan, *supra* note 69, at 341 (“Only a few selective examination or magnet schools come close to considering individual students and basing decisions on merit.”).

<sup>99</sup> *See id.* at 342.



budget. Furthermore, as some have recognized, it would be ridiculous to require school administrators to undertake such detailed review of scores of very young schoolchildren.<sup>100</sup>

The Court also could disapprove of a district's student assignment plan that seeks to avoid racial isolation because it focuses on racial group membership rather than on individual students. Justice Kennedy's approval of the use of a racial classification appears only to envision an approach "informed by *Grutter*" but tailored to the elementary and secondary context, in which a district undertakes "if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."<sup>101</sup> Kennedy did not hide his disdain for government use of racial classifications when he stated that "[r]eduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake."<sup>102</sup> The majority in *Parents Involved* distinguished the affirmative action program in *Grutter* from the Seattle and Louisville plans by the failure of the latter to treat each student "as an individual, and not simply as a member of a particular racial group."<sup>103</sup> The plurality contended that the plans' race-based treatment of students conflicted with the districts' objective of ensuring sufficient diversity in the student body to enable students to see their classmates from other races as individuals and not just members of a racial group.<sup>104</sup> Thus, these opinions in *Parents Involved* soundly denounce those government actions, solely based on race, that fail to employ an individualized consideration of students.<sup>105</sup>

This position clashes with the recognition by Justice Kennedy and the four dissenting justices that avoiding racial isolation is a compelling interest.<sup>106</sup> The dispositive factor for avoiding racial isolation is race—

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<sup>100</sup> See *id.*; Levine, *supra* note 68, at 521.

<sup>101</sup> *Parents Involved*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part and in the judgment).

<sup>102</sup> *Id.* at 2796.

<sup>103</sup> *Id.* at 2753; see also *Grutter*, 539 U.S. at 337 ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").

<sup>104</sup> *Id.* at 2759 (plurality opinion).

<sup>105</sup> See *id.* at 2753, 2759; *id.* at 2796 (Kennedy, J., concurring in part and in the judgment).

<sup>106</sup> See *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment); *id.* at 2835 (Breyer, J., dissenting).

unadorned and unaccompanied. Given this fact, James Ryan has recognized that the requirement for individualized, holistic review should not be applied to plans that seek to avoid racial isolation.<sup>107</sup> In light of the approval of avoiding *racial* isolation as a compelling interest by five members of the Court in *Parents Involved*, the Court could recognize in the future that, unlike diversity, preventing racial isolation requires distinguishing between and assigning students on the basis of their race<sup>108</sup> and that the benefits of avoiding racial isolation outweigh the harms that a lack of individualized consideration may engender.<sup>109</sup> Alternatively, Justice Kennedy might require districts to consider how to avoid racial isolation along with a variety of other factors, or he might only approve of efforts to avoid racial isolation through race-neutral means.<sup>110</sup> This would enable the Court to downplay the use of race as it has preferred to do in the past.<sup>111</sup>

Ultimately, this analysis reveals that a school district seeking to use a racial classification faces a series of difficult hurdles to satisfy the Court's narrow tailoring requirements. The difficulty of meeting these requirements may have led Justice Breyer to contend that although many school districts that consider race in making student-assignment or transfer decisions have found the consideration of race to be critical and "sometimes necessary," these districts oftentimes will find their efforts unlawful under the majority's opinion and always will find their efforts unlawful under the plurality's approach.<sup>112</sup> Furthermore, even when a district decides to adopt a racial classification, it will use it only in very rare circumstances given Justice Kennedy's contention that school districts must not adopt racial classifications on a widespread basis.<sup>113</sup> Thus, commentary on *Parents Involved* generally agrees that the Court has either closed the door on or left only a narrow opening for

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<sup>107</sup> Ryan, *supra* note 69, at 341.

<sup>108</sup> See *id.* at 342 ("If reducing racial isolation and increasing racial integration are considered constitutionally permissible goals, it would seem to follow that race alone—and not each student's overall potential to enhance diversity—can and should form the basis for decisions.").

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* at 343 ("[C]ourts—and ultimately the Supreme Court—may nonetheless see value in at least requiring that race not be the only factor that guides student assignments.").

<sup>111</sup> See *id.* ("One sees in *Grutter* and *Gratz*, and *Bakke* before them, evidence of a belief that it is better if the use of race is hidden rather than overt.").

<sup>112</sup> *Parents Involved*, 127 S. Ct. at 2835 (Breyer, J., dissenting) (noting that the Court's opinion has transformed strict scrutiny from "strict to fatal in fact" (internal quotation marks omitted)).

<sup>113</sup> See *id.* at 2797 (Kennedy, J., concurring in part and in the judgment).

using racial classifications in student assignment plans.<sup>114</sup> Therefore, districts that pursue diverse schools and seek to avoid racial isolation overwhelmingly will focus on race-neutral approaches. Part II explores what Supreme Court precedent and scholarly opinion tells us about the constitutionality of race-neutral student assignment plans.

## II. THE LEGAL AND SCHOLARLY LANDSCAPE OF RACE-NEUTRAL GOVERNMENT ACTION

The U.S. Supreme Court has not directly confronted the legality of race-neutral actions. (Again, a race-neutral action does not consider the

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<sup>114</sup> See John Brittain et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 610 (2008) ("The Court left a small window for the use of narrowly tailored race-conscious measures."); Heeren, *supra* note 16, at 133 ("This Article concludes that race-based plans remain constitutionally permissible after [*Parents Involved*], but only with exacting standards school districts will find difficult if not impossible to meet or in circumstances where the plan is largely ineffective at effecting change in school composition."); Renée M. Landers, *Massachusetts Health Insurance Reform Legislation: An Effective Tool for Addressing Racial and Ethnic Disparities in Health Care?*, 29 HAMLINE J. PUB. L. & POL'Y 1, 17 (2007) ("Even though Justice Kennedy provided the fifth vote to invalidate the Seattle and Louisville school assignment programs, his reasoning kept the notion that race-based programs have constitutional validity alive, albeit on life support."); Ryan, *supra* note 5, at 148 (2007) (noting that, for districts that continue to pursue integration, the *Parents Involved* decision "takes one means of accomplishing that goal off the table"); David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1083 (2008) ("[T]he plurality in *Parents Involved* all but declared that racial classifications may never be used . . . . The Court has never before come so close to declaring the use of race unconstitutional across the board."); William E. Thro, *The Constitutional, Educational, and Institutional Implications of the Majority and Concurring Opinions in Parents Involved for Community Schools*, 231 ED. L. REP. 495, 496 (2008) ("Except in those previously segregated districts that have not been declared unitary by the federal courts, school officials may not utilize race in making individual student assignments. School districts that presently do so must change their policies. . . . [R]acial integration will be difficult, if not impossible, to achieve."); Lauren E. Winters, *Colorblind Context: Redefining Race-Conscious Policies in Primary and Secondary Education*, 86 OR. L. REV. 679, 719 (2007) ("Parents, a plurality opinion, does not prohibit primary school officials from considering race in deciding whether students may attend the school of their choice; however, the reality is that Justice Kennedy's concurring opinion severely limits the ability to use race as a tool for eliminating de facto segregation."); Alexandra Villarreal O'Rourke, Note, *Picking Up the Pieces After PICS: Evaluating Current Efforts to Narrow the Education Gap*, 11 HARV. LATINO L. REV. 263, 264-65 (2008) ("Ultimately, Justice Kennedy provided the crucial fifth vote necessary to invalidate two school districts' race-conscious student assignment plans under the Equal Protection Clause. Given this outcome and the prevailing Justices' views about *Brown*, the *PICS* decision appears to forbid any use of race in student assignment plans."); Walsh, *supra* note 8, at 1 (noting the comments of education attorneys who allege that the decision signals to educators that the time to consider race in student assignments has ended and one advocate for urban districts contended that "[f]or all intents and purposes, the court said that you can use race, but we dare you to come up with a solution that passes muster").

race of individuals but rather is taken "at least in part 'because of,' not merely 'in spite of'" a racial goal.)<sup>115</sup> As the Court has not addressed the issue of what standard of judicial review applies to such actions, this Part analyzes Supreme Court precedent that will likely influence the Court's decision on what standard of review to apply to race-neutral government action and surveys scholarly opinion on this issue.<sup>116</sup> This Part concludes that, contrary to the opinion of some scholars, the Court probably will not apply strict scrutiny to a race-neutral student assignment plan.<sup>117</sup> In addition, this Part reveals how intermediate scrutiny and a meaningful interpretation of rational basis review can serve some of the same functions as strict scrutiny.<sup>118</sup>

In deciding on a student assignment plan, a school district might adopt a racial goal that shapes how it makes assignments at all of its schools, as did the Seattle and Louisville districts.<sup>119</sup> Alternatively, a district also may focus on ensuring that a magnet school or other specialized school enrolls a diverse student body or may strive to achieve diversity when it decides the location of a new school.<sup>120</sup>

A school district might also adopt a student assignment plan to achieve a variety of educational (rather than racial) goals.<sup>121</sup> In those instances, the plan should be judged according to the criteria used in the plan.<sup>122</sup> For example, if a school district adopts a class integration plan that considers a student's socioeconomic class for the purpose of developing middle class schools, then precedent dictates that rational basis review would apply.<sup>123</sup> In 1995, the Supreme Court, in *Adarand*

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<sup>115</sup> See *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (quoting *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1976)); see also *id.* at 362 ("Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality.").

<sup>116</sup> See *infra* notes 124–224 and accompanying text.

<sup>117</sup> Instead, this Article agrees with the majority of scholars who conclude that the Court will not apply strict scrutiny to race-neutral government action. See *infra* notes 219–223 and accompanying text.

<sup>118</sup> See *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and in the judgment); *id.* at 2835 (Breyer, J., dissenting); *infra* notes 137–181 and accompanying text.

<sup>119</sup> See Ryan, *supra* note 5, at 145.

<sup>120</sup> See *id.*

<sup>121</sup> See KAHLENBERG, *supra* note 5, at 37 (describing a district that pursues class integration).

<sup>122</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50–53 (1973) ("Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be [subject to strict scrutiny].").

<sup>123</sup> See *id.* at 18–28.

*Constructors, Inc. v. Pena*, considered the constitutionality of a contracting program that provided highway contracts to disadvantaged businesses and included a rebuttable race-based presumption to make some certification determinations.<sup>124</sup> The Court agreed that, because the elements of the challenged contracting program were based on disadvantage rather than race, they were race neutral and thus subject to "the most relaxed judicial scrutiny."<sup>125</sup>

Legal precedent and scholarly opinion send mixed signals about the constitutionality of race-neutral government action. For instance, Kim Forde-Mazrui has argued that some of the Court's past cases can be read to indicate that the Court will apply strict scrutiny to a race-neutral law that serves a "benign" racial purpose because that purpose is still discriminatory.<sup>126</sup> He noted that the Court in the 1976 case *Washington v. Davis* established that strict scrutiny applies to a government action with a discriminatory purpose whether that action is race-neutral or a race-based classification.<sup>127</sup> He pointed to the 1979 case *Personnel Administrator v. Feeney* as the case that defined "discriminatory purpose" as requiring a showing that the government actor "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."<sup>128</sup> Furthermore, in 1989 the Court in *City of Richmond v. J.A. Croson Co.* established that strict scrutiny applies to all state racial classifications without regard to the race of the group that is benefited or harmed by the racial classification,<sup>129</sup> and *Adarand* extended this rule to all federal racial classifications.<sup>130</sup> He explained that *Croson* and *Adarand* defined discrimination as including actions that benefited minorities at the expense of whites.<sup>131</sup> Therefore, he concluded that

when a legislature or public university intentionally seeks to admit minority students through race-neutral means, such as disadvantage-based preferences, it has taken a course of action "because of" and not merely "in spite of" its effect on racial minorities. Such efforts, therefore, should trigger the same

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<sup>124</sup> 515 U.S. 200, 212-13 (1995).

<sup>125</sup> *Id.*

<sup>126</sup> Forde-Mazrui, *supra* note 35, at 2346-48.

<sup>127</sup> *Id.* at 2347 (citing *Washington v. Davis*, 426 U.S. 229, 244-45 (1976)).

<sup>128</sup> *Id.* (quoting *Feeney*, 442 U.S. at 279) (internal quotation marks omitted).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2347-48.

<sup>131</sup> Forde-Mazrui, *supra* note 35, at 2347-48.

strict, and usually fatal, scrutiny applicable to admission policies that rely on racial classifications.<sup>132</sup>

Others also contend that the Court will or should apply strict scrutiny to race-neutral government actions or that such efforts should be struck down.<sup>133</sup>

#### A. *Why Strict Scrutiny Is Unnecessary to Uncover Illegitimate Motives*

Several arguments support why a court or scholars might believe that strict scrutiny represents the appropriate standard. Effective review of race-neutral efforts to increase diversity and avoid racial isolation, however, does not demand the application of strict scrutiny. The Supreme Court has noted that strict scrutiny enables it to separate racial classifications that seek to achieve a benign goal from those that seek to achieve an invidious one. For example, the plurality in *Croson* stated that:

[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.<sup>134</sup>

The Court has reaffirmed this view and its inability to distinguish improper motives from benign motives absent strict scrutiny.<sup>135</sup> In the same fashion, a lower court reviewing a race-neutral plan to enhance diversity and avoid racial isolation might believe that it similarly needs

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<sup>132</sup> *Id.* at 2348.

<sup>133</sup> See, e.g., Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1791–92 (1996) (contending that strict scrutiny would apply to race-neutral action because of the program's racial motivation); Chapin Cimino, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1310 (1997) (arguing that class-based preferences violate the principle against subterfuge in the voting rights cases and thus would be found unconstitutional); Fitzpatrick, *supra* note 35, at 279–80 (arguing that that the Court should apply strict scrutiny to race-neutral classifications, *inter alia*, because the failure to do so would render it too easy to circumvent antidiscrimination laws by using racial proxies).

<sup>134</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

<sup>135</sup> See *Johnson v. California*, 543 U.S. 499, 506 (2005); *Adarand*, 515 U.S. at 226; see also *Parents Involved*, 127 S. Ct. at 2764 (plurality opinion) (stating that past Supreme Court decisions "clearly reject the argument that motives affect the strict scrutiny analysis").

to apply strict scrutiny to be able to distinguish a benign goal from an invidious one.<sup>136</sup>

The Court has demonstrated, however, that it can uncover illegitimate motives without applying strict scrutiny. Even before the advent of "strict scrutiny," the Court demonstrated its ability to uncover illegitimate motives through its equal protection analysis. In 1886, in *Yick Wo v. Hopkins*, the Supreme Court held unconstitutional a San Francisco ordinance that forbade the operation of a laundry business without the approval of the city's board of supervisors.<sup>137</sup> The Court held that, although the text of the law was "fair on its face, and impartial in appearance," the unequal application of the law to deny those of Chinese ancestry the opportunity to operate a laundry business while granting that privilege to others violated the Equal Protection Clause.<sup>138</sup> Rather than apply strict scrutiny, the Court assessed the effect of the board's exercise of discretion.<sup>139</sup> Although the Court rarely struck down laws under the Equal Protection Clause until the 1950s,<sup>140</sup> it did not require strict scrutiny to uncover illegitimate motives when it began to use the Clause to combat discrimination.<sup>141</sup>

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<sup>136</sup> The fact that the school district is not explicitly considering race does not guarantee that the racial goal that it seeks to achieve is a benevolent one. Instead, a district could seek to divide students through a race-neutral mechanism, just as school districts that opposed the Court's ruling in *Brown* sought to evade its mandate by enacting freedom of choice plans or other plans that left segregation in place without explicitly requiring it. MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 373 (4th ed. 2002) (explaining that, among the devices to resist desegregation after *Brown*, "[t]he most important of these devices was the pupil assignment law, which purported to assign pupils to schools on the basis of considerations and characteristics other than race. In practice, such laws perpetuated one-race schools").

<sup>137</sup> See 118 U.S. 356, 374 (1886).

<sup>138</sup> *Id.* at 373.

<sup>139</sup> *Id.*

<sup>140</sup> See *Buck v. Bell*, 274 U.S. 200, 208 (1927) (referring to the Equal Protection Clause as "the last resort of constitutional arguments"); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 668 (3d ed. 2006) ("The promise of [the Equal Protection Clause] went unrealized for almost a century as the Supreme Court rarely found any state or local action to violate the [clause] until the mid-1950s.").

<sup>141</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971) (upholding lower court's order to school board to desegregate its schools); *Green v. County Sch. Bd.*, 391 U.S. 430, 441-42 (1968) (holding that school board's "freedom of choice" plan, under which primary and secondary students could choose their school, represented an effort to avoid compliance with *Brown* because the board had foregone far more effective means of desegregation); *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958) (invalidating state's efforts to delay school desegregation, despite state's purported goal of "promot[ing] the public peace by preventing race conflicts"); see also CHERMERINSKY, *supra* note 140, at 668 ("Since *Brown*, the Supreme Court has relied on the equal protection clause as a key

Furthermore, the Court's use of intermediate scrutiny and rational basis review demonstrate that strict scrutiny does not represent the only standard employed under the Equal Protection Clause that enables the Court to distinguish benign motives from illegitimate ones.<sup>142</sup> For example, in its 1975 ruling in *Weinberger v. Wiesenfeld*, the Court applied intermediate scrutiny to a statute that provided social security benefits to widows but not to widowers; the government argued the statute's purpose was to compensate women for the financial difficulties they face in supporting their families.<sup>143</sup> Upon investigation of the actual purpose, however, the statute and legislative history revealed that congressional intent in providing benefits only to women was "to permit women to elect not to work and to devote themselves to the care of children"—a purpose that "in no way is premised upon any special disadvantages of women."<sup>144</sup> The Court explained that it "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."<sup>145</sup> Even though the Court has approved of statutes that reduce the disparities in financial conditions between women and men,<sup>146</sup> it did not allow the government's mere recitation of this objective to deter its examination of Congress's actual motive.<sup>147</sup> Instead, it used intermediate scrutiny to uncover an improper motive that led to the statute's invalidation.<sup>148</sup>

Similarly, in the 1980 case *Wengler v. Druggists Mutual Insurance Co.*, the Court held that a classification that sought to provide for financially needy surviving spouses by paying benefits to all female surviving spouses while requiring men to prove dependency did not substantially

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provision for combating invidious discrimination and for safeguarding fundamental rights.").

<sup>142</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

<sup>143</sup> 420 U.S. at 618.

<sup>144</sup> *Id.* at 648.

<sup>145</sup> *Id.* at 648 n.16; see also *Califano v. Westcott*, 443 U.S. 76, 84 (1979) (rejecting statute in which benefits were provided to families when the father had lost his job but not the mother, because the classification was designed to reduce costs rather than the objective proffered by Congress).

<sup>146</sup> See, e.g., *Califano v. Webster*, 430 U.S. 313, 317–20 (1977) ("Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective [sufficient to withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause].").

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*



further the important objective of the statute because that objective could be served absent the differential treatment.<sup>149</sup> The Court rejected the state legislature's assertion that the financial conditions of employed men and women validated automatically giving the benefit to widows and instead found that the administrative convenience driving the state's actions represented an insufficient justification for a gender classification.<sup>150</sup> Therefore, intermediate scrutiny again proved adequate to uncover an ulterior and ultimately illegitimate motive.<sup>151</sup>

The Court also has used rational basis review to uncover impermissible motives and thus strike down government action, although it has rarely struck down laws as unconstitutional under this test.<sup>152</sup> Rational basis review represents the minimum standard that a law must meet to be consistent with the Equal Protection Clause.<sup>153</sup> It requires that a law be rationally related to a legitimate government purpose, and those who challenge a law reviewed under this standard bear the burden of proving that the law represents an arbitrary or irrational government action.<sup>154</sup> The government may proffer any legitimate purpose to support the legislation even if that purpose does not represent the actual purpose of the legislation.<sup>155</sup>

The Court found an impermissible motive behind the law at issue in its 1996 case *Romer v. Evans*. There, the Court applied rational basis review to strike down a Colorado law repealing legislation that had protected homosexuals and bisexuals from discrimination and that prevented the government from protecting such individuals in the future.<sup>156</sup> The Court concluded that animus toward homosexuals and bisexuals motivated the law and, therefore, that the law lacked the le-

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<sup>149</sup> 446 U.S. 142, 150-52 (1980).

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> CHEMERINSKY, *supra* note 140, at 689; Goodwin Liu, Brown, Bollinger, and Beyond, 47 How. L.J. 705, 767 (2004) ("[T]he Court has shown itself capable of applying rigorous scrutiny through rational basis review to policies that impinge on important interests or potentially vulnerable groups.").

<sup>153</sup> *See, e.g.,* Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (noting that, under rational basis review, a government actor need only show that "the classification scheme embodied in the [law] is 'rationally related to a legitimate state interest'" (quoting *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976))); *see also* CHEMERINSKY, *supra* note 140, at 672, 677.

<sup>154</sup> *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

<sup>155</sup> *See McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

<sup>156</sup> *Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.").

gitimate purpose required by rational basis review.<sup>157</sup> Similarly, the Court held in the 1973 case *U.S. Department of Agriculture v. Moreno* that a congressional intent to exclude “hippies” from the food stamp program did not supply a legitimate government interest for a statute that excluded households in which an unrelated individual lived.<sup>158</sup> Likewise, the Court also held in the 1985 case *City of Cleburne v. Cleburne Living Center, Inc.* that “an irrational prejudice against the mentally retarded” had led Cleburne, Texas, to withhold a special-use permit from a group home for mentally retarded individuals and that the denial failed rational basis review.<sup>159</sup>

Some contend that the foregoing cases represent a more demanding or heightened interpretation of rational basis review.<sup>160</sup> The Court itself has admitted that its rational basis jurisprudence has been less than consistent or uniform,<sup>161</sup> and it has rarely and unpredictably invoked this more substantial version.<sup>162</sup> Despite its inconsistent applica-

<sup>157</sup> *Id.* at 634–35.

<sup>158</sup> 413 U.S. 528, 534 (1973).

<sup>159</sup> 473 U.S. 432, 446, 450 (1985). Although *Cleburne* can be characterized as a case in which the Court applied the rational basis test with more “bite” than it typically applies for rational basis review, the decision “also can be seen as a straightforward application of rational basis review: Drawing a distinction between a home for the mentally disabled and all other facilities is based on nothing other than irrational prejudices and thus fails even deferential scrutiny.” CHEMERINSKY, *supra* note 140, at 688.

<sup>160</sup> See, e.g., William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1383–84 (2000) (referring to rational basis review of *Romer* as more scrutinizing than normal rational basis review and as “rationality plus”); Nan. D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104 (2004) (describing the analysis in *Romer* as heightened rational basis review); Barry P. McDonald, *If Obscenity Were to Discriminate*, 103 NW. U. L. REV. 72, 82 (2008) (noting that the Court in *Romer* used a “heightened” rational basis review); Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 436 (2005) (agreeing with Justice O’Connor that the Supreme Court sometimes uses heightened rational basis review and referring to *Cleburne* as an example); Erica Williamson, *Moving Past Hiphies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 719 n.180 (2006) (acknowledging the use of heightened rational basis review and referring to it as a form of judicial activism); *The Supreme Court, 2005 Term—Leading Cases: Redistricting—Partisan Gerrymandering*, 120 HARV. L. REV. 243, 253 n.60 (2006) (referring to the analysis in *Romer v. Evans*, *City of Cleburne v. Cleburne Living Center, Inc.*, and *United States Department of Agriculture v. Moreno* as heightened rational basis).

<sup>161</sup> See U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176–77 n.10 (1980).

<sup>162</sup> See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 517 (2004) (“[D]ivergent emphases [in rational basis review] reflect a persistent tension about the nature of rational basis review, which has left the doctrine with a somewhat unpredictable feel and, at times, without sufficient focus on whether a meaningful connection exists between government action and the purported justifications for that action.”); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1028 (2003).

tion, the Court can employ rational basis review to uncover illegitimate motives, even if that review is a bit more rigorous than usual.

In fact, the Court understands rational basis review in part as a standard that seeks to reveal when a government actor attempts to disadvantage a particular group because of a hostility or prejudice toward that group.<sup>163</sup> As the Court explained when it applied rational basis review in *Moreno*, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>164</sup>

These cases establish that a court need not cling to strict scrutiny as the sole means available to uncover improper motives; courts can uncover an improper motive regardless of the standard that is applied.<sup>165</sup> A court, therefore, need not decide the level of scrutiny that it will apply to determine if an improper or illegitimate motive exists. Instead, as proposed below, a court could examine the motive behind the race-neutral action as a preliminary matter and then apply rational basis review to those actions that serve a benign purpose and do not use a suspect classification, such as gender.<sup>166</sup>

B. *Why Strict Scrutiny's Analysis of the Connection Between the Classification and the Objective Is Unnecessary to Uncover Government Action Motivated by Stereotype of Prejudice*

Another argument favoring the application of strict scrutiny to a race-neutral student assignment plan is that it enables courts to ensure such a close fit between the racial classification and its goal that little or no room remains for a racial stereotype or prejudice to have motivated the government actor.<sup>167</sup> Here again, strict scrutiny does not represent the only standard that can uncover illegitimate stereotypes or prejudices through its examination of the fit between the government action and its alleged goal. In fact, the Court's justification for using intermediate scrutiny in the context of a sex classification<sup>168</sup> closely mirrors that for using strict scrutiny. The Court has explained, in requiring a substantial relationship between a sex classification and its objective, that "[t]he purpose of requiring that close relationship is to assure that

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<sup>163</sup> See *Moreno*, 413 U.S. at 534.

<sup>164</sup> *Id.* (emphasis added).

<sup>165</sup> See *Romer*, 517 U.S. at 635; *Weinberger*, 420 U.S. at 648.

<sup>166</sup> See *infra* notes 462-503 and accompanying text.

<sup>167</sup> See *Croson*, 488 U.S. at 493 (plurality opinion).

<sup>168</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."<sup>169</sup> In *Croson*, the narrow tailoring analysis was justified on similar grounds when the Court explained that "[t]he [strict scrutiny] test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."<sup>170</sup>

Case law reveals that the examination of the relationship between the ends and the means required by both intermediate scrutiny and rational basis review can serve to prevent government actors from pursuing policies motivated by prejudice or stereotype.<sup>171</sup> For example, in the 1977 case *Califano v. Goldfarb*, the Supreme Court struck down a federal statutory provision that required a man to prove that he received at least half of his support from his wife to receive survivors' benefits based upon his wife's earnings while a woman automatically received benefits determined by her husband's earnings.<sup>172</sup> The Court noted that female workers could not receive less protection for their spouses than men "at least when supported by no more substantial justification than archaic and overbroad generalizations, or old notions, such as assumptions as to dependency, that are more consistent with the role-typing society has long imposed than with contemporary reality."<sup>173</sup> Because women and men were similarly situated, the Court held, their dissimilar treatment based upon a stereotype violated their right to equal protection of the laws.<sup>174</sup>

In the 1979 case *Orr v. Orr*, the Supreme Court held unconstitutional a statute that required alimony to be paid to women but not to men.<sup>175</sup> The Court concluded that because Alabama already conducted individualized hearings to assess the relative financial circumstances of the spouses, even if sex were a sufficiently reliable proxy for need, providing assistance to needy spouses would in no way be hindered if Alabama determined alimony payment based on this individualized assessment.<sup>176</sup> In fact, such hearings provide a much more accurate

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<sup>169</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982).

<sup>170</sup> *Croson*, 488 U.S. at 493 (plurality opinion).

<sup>171</sup> *E.g.*, *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *Orr v. Orr*, 440 U.S. 268, 281-82 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977).

<sup>172</sup> *Califano*, 430 U.S. at 207.

<sup>173</sup> *Id.* (internal quotation marks and citations omitted).

<sup>174</sup> *Id.*

<sup>175</sup> 440 U.S. at 281-82.

<sup>176</sup> *Id.*

assessment of an individual's needs.<sup>177</sup> The Court held that the sex-based classification "carries with it the baggage of sexual stereotypes" and thus could not survive intermediate scrutiny.<sup>178</sup>

Although the Supreme Court rarely strikes down laws under rational basis review, in the 1982 case *Zobel v. Williams*, it held unconstitutional an Alaska law that determined the amount of state dividends from national resources to be disbursed to state residents based on how long they had lived in the state because "Alaska ha[d] shown no valid state interests which [were] rationally served by the distinction it [made] between citizens" based on whether they lived in the state prior to 1959.<sup>179</sup> The Court held that the state's desire to encourage individuals to move to and remain in Alaska and to prudently manage the state's natural resources did not rationally relate to granting benefits to those who lived in the state twenty-one years before the law was enacted.<sup>180</sup> Because its review of the statute revealed an impermissible motive to disfavor new residents, the Court found that the Alaska statute violated the Equal Protection Clause.<sup>181</sup>

Undoubtedly, both intermediate scrutiny and rational basis review can be criticized for permitting governments to act based upon stereotypes and prejudicial behavior. Some argue the Court's application of intermediate scrutiny perpetuated stereotypes,<sup>182</sup> for example, when the Court upheld the exclusion of women from combat as the basis for upholding a male-only draft registration policy<sup>183</sup> and when the Court refused to invalidate a statutory rape law premised on the notion that young men could consent to sexual intercourse but young women were legally incapable of the same consent.<sup>184</sup> Rational basis review also can

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 283.

<sup>179</sup> 457 U.S. at 65.

<sup>180</sup> *Id.* at 61-62. The Court also noted that any state interest in discouraging people from moving to the state would encounter substantial constitutional obstacles. *Id.* at 62.

<sup>181</sup> *Id.* at 65.

<sup>182</sup> See, e.g., CHIMERINSKY, *supra* note 140, at 762 ("[I]n some cases the Court has upheld laws benefiting women even though they seem to be based on stereotypes."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1572-77 (2d ed. 1988) (arguing that several Supreme Court decisions that upheld sex classifications, such as the males-only draft registration and a statutory rape law, are examples of "courts invoking a legacy of female subordination to men to justify further gender discrimination," thereby requiring "women to trade liberty for protection against men").

<sup>183</sup> See *Rostker v. Goldberg*, 453 U.S. 57, 76-77, 81-82 (1981).

<sup>184</sup> See *Michael M. v. Super. Ct.*, 450 U.S. 464, 466 (1981); *id.* at 494-95 (Brennan, J., dissenting) ("[T]he law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual inter-

be criticized for allowing the government to act upon its prejudices, such as when the Court upheld a city regulation that excluded from employment with the local transit authority individuals enrolled in a program that supplied them with methadone (which is used to counter the physical manifestations of heroin addiction), despite evidence that the substantial majority of those who were enrolled in the program for at least one year were free from drug use.<sup>185</sup>

Strict scrutiny, however, is subject to the same criticism. In fact, the Supreme Court itself has noted that strict scrutiny can allow an illegitimate classification to survive, stating in *Adarand* that "*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification."<sup>186</sup> The Court's decision to uphold the admissions policy at the University of Michigan Law School in *Grutter* has been criticized as perpetuating stereotypes about minority students.<sup>187</sup> This criticism is proof that no legal standard will guarantee that the Court will uncover all stereotypes and prejudices.<sup>188</sup>

### C. Why Other Arguments for Applying Strict Scrutiny to Race-Neutral Actions Are Unpersuasive

One might also argue that strict scrutiny should apply to race-neutral efforts to create diverse schools and avoid racial isolation so that courts examine government actions that pursue a racial goal under a consistent legal standard. Since its decision in *Adarand* to overrule the application of a less rigorous standard to benign federal racial classi-

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course. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection.").

<sup>185</sup> *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 575, 594 (1979). Furthermore, the dissenting justices noted the disparate impact of the law given the fact that sixty-three percent of methadone users are black and Hispanic. *Id.* at 600 (White, J., dissenting).

<sup>186</sup> *Adarand*, 515 U.S. at 236 (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944)).

<sup>187</sup> See, e.g., L. Darnell Weeden, *Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 *BERKELEY J. EMP. & LAB. L.* 511, 527-28 (2005). According to Weeden:

[U]nder *Grutter*, qualified minority students with lesser academic credentials receiving a racial preference are likely to be viewed as inferior students in the academic community. The *Grutter* opinion is a dangerous precedent because its rationale for admitting qualified students with lesser academic credentials based on their racial group status perpetuates a stereotypical group status view that those students received the racial preference, and are thus not qualified on their own merit to be at the law school.

*Id.*

<sup>188</sup> See *id.*

cations, the Court has identified the consistency of applying strict scrutiny to racial classifications as a reason for rejecting arguments for applying a different standard to federal versus state racial classifications and for using a different standard based upon the race of the individuals who are helped or harmed by the classification.<sup>189</sup> Few would find it remarkable for the Court to apply strict scrutiny to a race-neutral action that sought to divide students of different racial groups, particularly given its past invalidation of facially race-neutral actions that sought to disadvantage minorities.<sup>190</sup> Therefore, the drive for consistency in the standard applied to all racial goals could lead a lower court to apply strict scrutiny to race-neutral actions.<sup>191</sup>

Furthermore, although a race-neutral approach does not use a racial classification to achieve its goal, it still involves government action "based on race" because the ultimate objective remains a racial one.<sup>192</sup> Thus, in the 1978 Supreme Court case of *Regents of the University of California v. Bakke*, Justice Powell explained the justification for applying strict scrutiny by stating that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>193</sup> An effort to promote diversity and avoid racial isolation could still be characterized as "based on race" and as a racial distinction even though a school board has not adopted an explicit racial classification.<sup>194</sup>

Although a court might garner the above reasons for applying strict scrutiny to race-neutral efforts, strict scrutiny does not represent the only effective standard for reviewing the constitutionality of such actions or the only possible reading of the Supreme Court's past decisions. The above analysis demonstrates that, when necessary, even rational basis review can uncover illegitimate motives and actions based

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<sup>189</sup> See *Adarand*, 515 U.S. at 226-27 (rejecting the *Metro Broadcasting* opinion's deviance from "congruence between the standards applicable to federal and state racial classifications" and from "consistency of treatment irrespective of the race of the burdened or benefited group"); *Croson*, 488 U.S. at 493-94 (plurality opinion) (reaffirming that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

<sup>190</sup> See, e.g., *Green*, 391 U.S. at 441-42 (invalidating a "freedom of choice" plan that maintained racially segregated schools); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (overturning voting requirement that determined voter eligibility on whether one's grandfather had been eligible to vote before the Fifteenth Amendment was passed).

<sup>191</sup> See *Green*, 391 U.S. at 441-42; *Guinn*, 238 U.S. at 365.

<sup>192</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (plurality opinion).

<sup>193</sup> *Id.*

<sup>194</sup> See *id.*

on stereotypes.<sup>195</sup> In addition, the Court does not always apply strict scrutiny when a government actor considers race.<sup>196</sup> For instance, "the Court has held that the consideration of race in legislative redistricting does not automatically trigger strict scrutiny as 'the theory of strict scrutiny [has] yielded to the need for an electoral system that is equally open to members of minority groups.'" <sup>197</sup> Instead, the Court only applies strict scrutiny when race predominates over other race-neutral districting principles, such as compactness and contiguity.<sup>198</sup> Therefore, a decision to decline to apply strict scrutiny to race-neutral student assignment plans would not be inconsistent with the totality of the Court's jurisprudence that addresses the influence of race in government decisionmaking.<sup>199</sup>

More importantly, by examining whether a government actor that used a racial classification could have achieved its objective through a race-neutral approach, the Court has encouraged governments to adopt race-neutral policies to achieve racial goals by signaling that it views such action with less skepticism.<sup>200</sup> Otherwise, the Court has merely encouraged government actors to adopt one constitutionally suspect approach for another.<sup>201</sup> For example, in *Croson*, in striking down the City of Richmond's minority contracting set-aside, the Court noted an array of alternatives that the city could have adopted to

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<sup>195</sup> See *supra* notes 153–165 and accompanying text.

<sup>196</sup> See Archer, *supra* note 68, at 655 ("Despite its seemingly definitive language in *Adarand*, the Supreme Court has not automatically applied strict scrutiny to all governmental uses of race, influenced, in part, by the tradition of deference afforded to the governmental entity or the nature of the legislation.").

<sup>197</sup> *Id.* at 656 (quoting Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1603 (2002)).

<sup>198</sup> See *Bush v. Vera*, 517 U.S. 952, 962 (1996); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

<sup>199</sup> See *Bush*, 517 U.S. at 962; *Hunt*, 517 U.S. at 907; *Miller*, 515 U.S. at 916; *Reno*, 509 U.S. at 646.

<sup>200</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) ("Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity university seeks."); *Adarand*, 515 U.S. at 237–38 (noting that it was remanding for the lower courts to address whether Congress considered any race-neutral means); *Croson*, 488 U.S. at 509–10 (plurality opinion) (holding that the city had a variety of race-neutral alternatives available "to increase the accessibility of city contracting opportunities to small entrepreneurs of all races" because altering the requirements for the contracts "would have [had] little detrimental effect on the city's interests"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion) (noting that narrow tailoring requires a government actor to examine whether a nonracial approach would accomplish the objective).

<sup>201</sup> See *Grutter*, 539 U.S. at 339; *Adarand*, 515 U.S. at 237–38; *Croson*, 488 U.S. at 509, 510.



achieve its goal of increasing minority contractors without adopting a racial classification.<sup>202</sup> The *Parents Involved* majority also emphasized race-neutral alternatives by holding the assignment plans unconstitutional in part because the districts had failed to demonstrate that they had examined race-neutral alternatives to the racial classifications that they had adopted.<sup>203</sup> The Court's repeated insistence that race-neutral measures should be examined and adopted instead of a racial classification undermines the conclusion that the Court will apply strict scrutiny to race-neutral government action.<sup>204</sup>

Ultimately, a court that decides that strict scrutiny represents the appropriate legal standard for race-neutral actions may see its decision as moving the nation one step closer to a colorblind approach to the Constitution. The *Parents Involved* plurality's depiction of *Brown I* and *Brown II* as opinions focused on ensuring that schools admit students "on a nonracial basis"<sup>205</sup> embraces this approach in refusing to recognize any constitutionally significant distinction between the racial classifications struck down in *Brown*, which sought to divide students by race, and the efforts of Seattle and Louisville to bring together students of different races.<sup>206</sup> For those who subscribe to the colorblind Constitution, courts should invalidate the indirect pursuit of a racial goal just as they should invalidate the direct pursuit of such a goal.<sup>207</sup>

As noted above, however, the Court's support for race-neutral approaches to achieve a racial goal reveals that it does not view the pursuit of racial goals as illegitimate.<sup>208</sup> To the contrary, the Court in *Adarand* acknowledged that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality," and noted that "government is

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<sup>202</sup> *Crosby*, 488 U.S. at 509–10.

<sup>203</sup> 127 S. Ct. 2738, 2761 (2007).

<sup>204</sup> *See id.*

<sup>205</sup> *Id.* at 2767 (plurality opinion) (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955)).

<sup>206</sup> *See* Goodwin Liu, "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. POL'Y REV. 53, 61 (2008) (criticizing the plurality in *Parents Involved* for failing to acknowledge the distinction between the use of race in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), that "was an expression of racial hostility, a public humiliation, and a badge of inferiority not only for her but for all black children" and the use of race to bring students of diverse backgrounds together in Louisville that merely served as "an inconvenience and perhaps a significant disappointment" to the original plaintiff who was denied admission to an elementary school in Louisville because of the district's racial guidelines).

<sup>207</sup> *See Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

<sup>208</sup> *See id.* at 2761, 2767.

not disqualified from acting in response to it.”<sup>209</sup> Racial goals must be pursued with careful attention to the approach adopted, which may only include a racial classification when necessary.<sup>210</sup> Also, one way to help reduce the relevance of race is to ensure that individuals are exposed to a broad cross section of people.

Furthermore, the adoption of a colorblind approach to the Constitution today would ignore the structural inequalities that converge in racially isolated schools to create inferior educational opportunities.<sup>211</sup> Because “[s]trict scrutiny is virtually always fatal to the challenged law,”<sup>212</sup> its application to race-neutral efforts would condemn growing percentages of minority students to racially isolated schools. The future of such schools is clear because “[d]espite the valiant efforts of some educators and policy makers to improve racially isolated schools in poor communities of color, history and research demonstrate that this is not a winning strategy for closing the achievement gap and expanding opportunity.”<sup>213</sup> Because research demonstrates that “ongoing segregation maintains the unequal status quo,”<sup>214</sup> a decision to apply a nearly insurmountable legal standard to race-neutral efforts to prevent racially isolated schools will exacerbate the inequality that eviscerates the educational and professional opportunities of many minority students.<sup>215</sup>

Moreover, applying strict scrutiny to race-neutral efforts to achieve diversity or avoid racial isolation would effectively end not only those efforts but also a host of other efforts to achieve racial equality. Richard Banks has noted that this concern extends to efforts to narrow the racial achievement gap, to improve minority voter participation, and to repeal a law that disenfranchises felons because it disproportionately harms African American men.<sup>216</sup> He insightfully notes that “[t]he prospect of applying strict scrutiny to these sorts of measures would cut against the view, shared by many, that the government should be able to play *some*

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<sup>209</sup> *Adarand*, 515 U.S. at 237.

<sup>210</sup> *See id.*

<sup>211</sup> *See Wells & Frankenberg*, *supra* note 5, at 183 (“It is this centrality of structural inequality and its relationship to racial segregation that four of the five Supreme Court justices who made up the majority in the *Parents Involved* decision completely denied in putting forth their ‘colorblind’ argument.”).

<sup>212</sup> CHEMERINSKY, *supra* note 140, at 671; *see also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “strict in theory and fatal in fact” (internal quotation marks omitted)).

<sup>213</sup> *Wells & Frankenberg*, *supra* note 5, at 187.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.*

<sup>216</sup> Banks, *supra* note 35, at 580–81.

role in narrowing racial disparities in, for example, political participation, education, employment, and health.”<sup>217</sup> A decision to apply strict scrutiny to race-neutral government action would handcuff the government’s ability to address any concerns about racial inequality in American society.<sup>218</sup> Clearly, such an approach should be avoided when viable alternatives exist that protect the competing interests at stake.

Therefore, this Article agrees with those scholars who contend that the Court should not apply strict-scrutiny to race-neutral government action.<sup>219</sup> For instance, when Kathleen Sullivan considered whether “the goal of increasing racial diversity [should] trigger constitutional skepticism when decoupled from race-specific means,” she indicated that “[s]trong arguments suggest that it should not. . . . [R]ace-neutral proxy devices for seeking racial diversity should not be understood at the outset as implicating a racially discriminatory purpose.”<sup>220</sup> Richard Banks agrees that strict scrutiny should not apply to race-neutral action to diversify schools because of the benign purpose behind such action and the absence of “a racially discriminatory means.”<sup>221</sup> Other scholars similarly argue that the Court will not or should not apply strict scrutiny to race-neutral actions.<sup>222</sup> In fact, the majority of scholars reach this

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<sup>217</sup> *Id.* at 581; see also Forde-Mazrui, *supra* note 35, at 2334.

<sup>218</sup> See Banks, *supra* note 35, at 581.

<sup>219</sup> Forde-Mazrui offers a different interpretation of the implications of the Court’s preference for race-neutral action. Forde-Mazrui, *supra* note 35, at 2351. He contends that the Court’s endorsement of race-neutral actions in *Croson* suggests that it may uphold the legality of race-neutral action by holding that race-neutral affirmative action satisfies strict scrutiny. *Id.*

<sup>220</sup> Sullivan, *supra* note 35, at 1054.

<sup>221</sup> Banks, *supra* note 35, at 584.

<sup>222</sup> See, e.g., Elizabeth Jean Bower, *Answering the Call: Wake County’s Commitment to Diversity in Education*, 78 N.C. L. REV. 2026, 2043 (2000) (“*Davis* instructs that despite a racially disproportionate impact, a court is not likely to infer a discriminatory purpose from a facially race-neutral classification. Absent this inference, the classification would not trigger heightened scrutiny and the rational basis standard would apply.”); Andrew M. Carlson, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1199 (arguing that it is appropriate to exempt race-neutral action from strict scrutiny); Heeren, *supra* note 16, at 180 (contending that a race-neutral plan will be subject to rational basis review); Stylianos-Ioannis G. Koutnatzis, *Affirmative Action in Education: The Trust and Honesty Perspective*, 7 TEX. F. ON C.L. & C.R. 187, 270 (2002) (“The very same Court that has generally demonstrated skepticism about the explicit consideration of race has suggested that the use of race-neutral means would not need to meet the requirement of strict scrutiny.”); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 449 (1997) (“To be sure, standardized tests and welfare programs are facially race-neutral, and strict scrutiny does not apply to race-neutral laws in the absence of some showing of an invidious racial purpose.”); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 642 (2005) (“*Grutter* evidences a clear Supreme Court preference for race-neutral over race-conscious efforts to ameliorate the plight of racial minorities. Race-neutral affirmative action is subject to only rational basis review, but race-

conclusion.<sup>223</sup> Similarly, several lower courts have declined to apply strict scrutiny to race-neutral government action.<sup>224</sup>

In conclusion, the important point is that the Court appears to have implicitly placed its imprimatur on a race-neutral approach to achieve a racial goal by repeatedly urging governments to consider such approaches instead of racial classifications.<sup>225</sup> The Court's encouragement of race-neutral government action recognizes that these measures do not involve the same harms as racial classifications. Instead, the manner in which the government's goal is pursued can substantially influence the Court's review of such efforts.<sup>226</sup> Part III of this Article explores the relative harms of racial classifications and the relative benefits of race-neutral actions and explains why this implicit assumption in the case law is correct.

### III. WHY GOVERNMENTS SHOULD BE GIVEN WIDE LATITUDE TO ADOPT RACE-NEUTRAL STUDENT ASSIGNMENT PLANS THAT SEEK TO AVOID RACIAL ISOLATION AND PROMOTE DIVERSITY AND A DOCTRINAL PROPOSAL TO ACHIEVE THIS GOAL

This Part argues that courts should provide schools districts with wide latitude to adopt race-neutral efforts to avoid racial isolation and promote diversity because these efforts can help to advance the purpose of the Equal Protection Clause while avoiding some of the harms

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conscious affirmative action is subject to strict equal protection scrutiny."); L. Darnell Weeden, *Creating Race-Neutral Diversity in Federal Procurement in a Post-Adarand World*, 23 WHITTIER L. REV. 951, 978-79 (2002) (arguing that "race-neutral governmental policies designed to neutralize societal discrimination may be implemented under the rational basis standard of review"); Winters, *supra* note 114, at 722-23 (arguing that rational basis review would apply to a socioeconomic integration plan even if the district used class to achieve racial integration).

Furthermore, before the *Parents Involved* decision, some argued that strict scrutiny should not apply to the use of racial classifications to integrate public elementary and secondary schools. See, e.g., Archer, *supra* note 68, at 664. Presumably, scholars that held this view would agree that courts should not apply strict scrutiny to race-neutral efforts to achieve diversity or avoid racial isolation. Similarly, several lower courts have declined to apply strict scrutiny to race-neutral government action. See Banks, *supra* note 35, at 579-80 (summarizing several cases where courts declined to apply strict scrutiny to race-neutral government action).

<sup>223</sup> Carlon, *supra* note 222, at 1155 (noting that the scholarship on the constitutionality of race-neutral action generally rejects the view that strict scrutiny will apply to race-neutral government action).

<sup>224</sup> See Banks, *supra* note 35, at 579-80 (summarizing several cases where courts declined to apply strict scrutiny to race-neutral government action).

<sup>225</sup> See *supra* notes 200-204 and accompanying text.

<sup>226</sup> See Ryan, *supra* note 69, at 343.

of racial classifications. Section A examines the purpose of the Equal Protection Clause; it argues that the interpretation of that clause should not be limited to the U.S. Supreme Court's current anticlassification focus, but rather that it should include an antisubordination analysis.<sup>227</sup> Section B explains why racial isolation in schools has a subordinating effect and how diversity in schools can help to address this effect.<sup>228</sup> It also shows how race-neutral government efforts to avoid racial isolation and promote diversity can help advance an antisubordination interpretation of the Equal Protection Clause.<sup>229</sup> Section C argues that race-neutral efforts to avoid racial isolation and promote diversity can avoid some of the harms of racial classifications.<sup>230</sup> Section D concludes that once courts conduct a threshold inquiry into the purpose and effect of race-neutral student assignments plans, they should apply rational basis review to benign efforts to avoid racial isolation and enhance diversity because these efforts help to accomplish the purpose of the Equal Protection Clause while avoiding some of the harms of racial classifications.<sup>231</sup> It further notes that a meaningful application of rational basis review that does not abdicate all judicial review of race-neutral efforts could still uncover any hidden illegitimate motive or stereotyping that lies behind a race-neutral plan.<sup>232</sup>

### A. *The Purpose of the Equal Protection Clause*

What equal protection requires can be interpreted in a variety of ways.<sup>233</sup> In 1954 in *Brown v. Board of Education*, the Supreme Court em-

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<sup>227</sup> See *infra* notes 233–307 and accompanying text.

<sup>228</sup> See *infra* notes 308–359 and accompanying text.

<sup>229</sup> See *infra* notes 360–417 and accompanying text.

<sup>230</sup> See *infra* notes 418–461 and accompanying text.

<sup>231</sup> See *infra* notes 462–503 and accompanying text.

<sup>232</sup> See *infra* notes 478–481 and accompanying text.

<sup>233</sup> JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 102 (1983); JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 22 (2007) ("Ultimately, the constitutional definition remains relative, and its applicability through the equal protection clause and as augmented by congressional civil rights statutes, Byzantine. The Court's decisions have reflected equality of opportunity, status, and treatment."); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 21 (1988); Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 534 (2006) (noting the ambiguity of the phrase equal protection under the law and that "[f]rom *Plessy v. Ferguson* to *Grutter v. Bollinger*, no question has been more central to racial and social justice, or more complex, than what it means to deny someone equal protection under the law. Though offering a conciseness that intimates simplicity, neither the courts nor the public have reached a full understanding of this phrase's import in regard to race. Rather, the

braced equal educational opportunity as the central obligation of the Equal Protection Clause in the education context.<sup>234</sup> Although justices disagreed in *Parents Involved* over what equal educational opportunity requires, they agreed that equal educational opportunity lies at the heart of *Brown*.<sup>235</sup> Justice Kennedy described *Brown*'s objective as one of "equal educational opportunity."<sup>236</sup> The plurality characterized *Brown* as holding "that segregation deprived black children of *equal educational opportunities* regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority."<sup>237</sup> Justice Breyer similarly viewed racial equality in educational opportunities as the core promise of *Brown*.<sup>238</sup> Thus, although it fundamentally disagreed over how equal educational opportunity may be realized consistent with the Constitution, the *Parents Involved* Court interpreted the Equal Protection Clause to require equal educational opportunity.<sup>239</sup>

The *Parents Involved* opinions can be read to track one of the central divides over how the Equal Protection Clause defines equality.<sup>240</sup> In debating how *Brown* defined equal educational opportunity, Justice Kennedy and the dissenting justices contended that *Brown* recognized

meaning has been approximated, changed and, as of late, assumed or ignored."); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) ("The words—no state shall 'deny to any person within its jurisdiction the equal protection of the laws'—do not state an intelligible rule of decision."); Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251, 257 (2008) ("[The] Equal Protection Clause . . . is an abstract moral and political phrase . . . . As such, the clause does not contain a definitive definition of 'equal protection' and does not specify what acts or omissions fall within or outside of the clause's command.");

<sup>234</sup> *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.");

<sup>235</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767 (2007) (plurality opinion); *id.* at 2791 (Kennedy, J., concurring in part and in the judgment); *id.* at 2836–37 (Breyer, J., dissenting); *see also Brown I*, 347 U.S. 483.

<sup>236</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and in the judgment).

<sup>237</sup> *Id.* at 2767 (plurality opinion) (emphasis added). Interestingly, the plurality opinion's focus on the inferiority that the racial classification denoted regardless of the tangible equality of the two schools could be read to suggest that the plurality recognizes the antisubordination interpretation of *Brown*. *See id.*

<sup>238</sup> *Id.* at 2836 (Breyer, J., dissenting) ("For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools.");

<sup>239</sup> *See id.* at 2767 (plurality opinion); *id.* at 2836 (Breyer, J., dissenting).

<sup>240</sup> *See id.* at 2791 (Kennedy, J., concurring in part and in the judgment).

that diverse educational settings represent an important component of equal educational opportunity.<sup>241</sup> This interpretation implicitly recognized that racially isolated educational environments have a subordinating effect on the students in those environments and that it is this subordination that equal protection prohibits.<sup>242</sup> In contrast, the justices in the plurality argued that *Brown* sought to eliminate using race to make school assignments and to usher in an era of colorblindness.<sup>243</sup> Similarly, as will be described below, the Court's current approach to equal protection primarily focuses on ensuring that the government has not used a prohibited classification and on remedying intentional discrimination.<sup>244</sup> In response, many scholars have identified the shortcomings of this approach and have contended that an antisubordination approach would better accomplish the purpose of the Equal Protection Clause and more effectively address the myriad forms of discrimination against a variety of groups.<sup>245</sup>

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<sup>241</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and in the judgment) (stating that "[s]chool districts can seek to reach *Brown*'s objective of equal educational opportunity" and that he cannot endorse the plurality opinion because it "is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling"); *id.* at 2800, 2836–37 (Breyer, J., dissenting) (noting "*Brown*'s promise of integrated primary and secondary education" and arguing that *Brown* embodied "the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools" and that "to invalidate the plans under review is to threaten the promise of *Brown*").

<sup>242</sup> See *id.* at 2791 (Kennedy, J., concurring in part and in the judgment); *id.* at 2821 (Breyer, J., dissenting).

<sup>243</sup> *Id.* at 2768 (plurality opinion) (stating that the implementation of *Brown* required that schools admit students "to the public schools on a nonracial basis." (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955))); see also *id.* at 2758 ("Allowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.'" (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (internal quotation marks omitted))).

<sup>244</sup> See *infra* notes 247–253 and accompanying text.

<sup>245</sup> For arguments criticizing the Court's current approach to equal protection, see Black, *supra* note 233, at 564–72; Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 261 (2004) (describing the Court's current approach to equal protection as a "rigid, tepidly enforced equal protection doctrine"); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1547 (2004). According to Siegel:

The modern equal protection tradition is commonly understood to be founded on an embrace of individualism associated with an anticlassification principle and a repudiation of concerns about group inequality associated with an antisubordination principle. History richly complicates this picture, as it shows that courts have deployed the presumption against racial classifica-

This Article agrees with those scholars who contend that an anti-subordination approach should guide the interpretation of the Equal Protection Clause because of the shortcomings of the Court's current approach to equal protection and the numerous advantages of the anti-subordination approach.<sup>246</sup> The Court's current approach to equal protection, which has been labeled an antidiscrimination, anticlassification, or colorblind approach, emphasizes the impropriety of government use of racial classifications.<sup>247</sup> The Court applies strict scrutiny to all racial

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tion to express, to disguise, and to limit constitutional concerns about practices that enforce group inequality.

*Id.*

For arguments in favor of an antistatutory approach to equal protection, see *TRIBE*, *supra* note 182, at 1515 (contending that the Equal Protection Clause includes an "antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens"); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (advocating an antistatutory perspective under which "it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole" and noting that the approach "seeks to eliminate the power disparities between . . . whites and non-whites, through the development of laws and policies that directly redress those disparities"); Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2295-96 (2001) ("Whether an action or structure contributes to material oppression seems a much more fruitful, and ultimately, worthy way of addressing America's most intractable and complex problem: race."); Fiss, *supra* note 233, at 108; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 63 (1991) ("[A] revised approach to race must recognize the systemic nature of subordination in American society."); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 682-98; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411-12 (1994).

<sup>246</sup> This Article does not rely principally on the Framers' understanding of equal protection because of the ambiguity that scholars have noted in determining exactly what the Framers envisioned and because the Framers would not have imagined that some practices that have been invalidated under the clause would be found to violate equal protection. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 119 (1980); NELSON, *supra* note 233, at 21; Black, *supra* note 233, at 549-50.

<sup>247</sup> See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (stating that the Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race"); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of this amendment was to eliminate all official state sources of invidious racial discrimination in the



classifications, whether they harm or benefit minority groups.<sup>248</sup> When allegations of racial discrimination are raised, the Court typically requires plaintiffs to demonstrate intentional discrimination to establish a violation of the Equal Protection Clause.<sup>249</sup>

The Court currently focuses narrowly on intentional discrimination as the hallmark for defining an equal protection violation.<sup>250</sup> By focusing equal protection analysis on intentional discrimination, the Court has circumscribed how it defines discrimination and narrowed the actions that are required to be taken to remedy it. To define discrimination, the antidiscrimination framework assumes that racism arises from an individual intent to take action based upon someone's race.<sup>251</sup> Intentional discrimination, however, represents "the most nar-

States."); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) ("[T]he matter of primary concern [for the Fourteenth Amendment] was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."); see also Fiss, *supra* note 233, at 109, 119 (arguing that the Supreme Court's approach to equal protection adopts an "antidiscrimination principle" under which arbitrary or invidious discrimination is prohibited and that "also invokes the metaphor of blindness—as in 'color blindness'"); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987–88 (2007) (describing the Court's approach to equal protection as an anticlassification or colorblind approach); Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 289 (2007) (describing the Court's current approach as an "antidiscrimination" approach); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Action*, 51 U. MIAMI L. REV. 191, 271 (1997) (calling the Court's approach to equal protection a colorblind policy where "any use of race is presumptively unconstitutional"); Siegel, *supra* note 245, at 1473 (labeling the Court's current approach an anticlassification approach); Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race*, 6 SEATTLE J. FOR SOC. JUST. 673, 698 (2008) ("[T]he Court has, in essence, adopted a colorblind individualism as its mode of thinking.").

<sup>248</sup> See *Croson*, 488 U.S. at 493 (applying strict scrutiny to strike down a contracting plan to benefit minority contractors and stating that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

<sup>249</sup> See, e.g., *Davis*, 426 U.S. at 239, 244–45 (holding that a showing of intentional discrimination must be made to establish racial discrimination in violation of the Equal Protection Clause).

<sup>250</sup> See *Black*, *supra* note 233, at 564 ("The Supreme Court's measure of racial equal protection is the intent standard. The intent standard, however, is entirely inconsistent with equal protection's meaning, purpose, and modern factual realities."); Hutchinson, *supra* note 245, at 684.

<sup>251</sup> See Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 199–200 (2004) ("The standard theoretical model assumes that racism is primarily a product of individual bias, tastes or preferences. Under this 'individual intent' view, racism is rooted

row and archaic manifestation of discrimination."<sup>252</sup> The Court's focus on intentional discrimination undermines the ability of the equal protection doctrine to address other forms of discrimination that may be equally harmful.<sup>253</sup>

Numerous scholars have elucidated how an emphasis on intentional discrimination neglects the myriad other forms of discrimination. For example, one scholar has described how the Court's intent standard narrows the understanding of the Equal Protection Clause because "[i]ntent's paradigmatic focus is on discrimination rather than equality, which skews its inquiry away from whether a racial minority member has been given the fair consideration and protection of his government to whether the government has implemented some design to harm him."<sup>254</sup> Similarly, Charles Lawrence has explained that such a limited definition of discrimination does not make sense because racism often operates at the unconscious level, where the attitudes and stereotypes that individuals have absorbed influence their actions in subtle but invidious ways.<sup>255</sup> He argues that discrimination law should be expanded to address these actions when they constitute racial discrimination that conveys a clear cultural meaning.<sup>256</sup> Richard Delgado has explained how even Lawrence's expanded definition of discrimination is flawed in part because "it sees racism as a series of isolated actions and not an integrated system that elevates one group at the expense of another" and it "ignores that race is the normal science of American life, not the aberrant, blameworthy exception, and how it serves as a valuable, if unstated, homeostatic mechanism for maintaining and replicating social relations."<sup>257</sup> In addition, some scholars have described racial hierarchy as a multiheaded monster with one head oppressing minorities and the

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in an intentional decision to give some social significance to skin color, and in intentional actions that correspond with that decision.").

<sup>252</sup> Hutchinson, *supra* note 245, at 665; *see also* Black, *supra* note 233, at 563. ("[E]qual protection is an affirmative guarantee, whereas discrimination is often conceptualized as a negative right. The right to be free from discrimination under the Supreme Court's precedent has only protected minorities when some action has been taken against them or some conscious consideration of race has occurred. Thus, it has primarily protected minorities in reaction to specified acts of others, whereas equal protection affirmatively demands that one not be denied of some privilege, consideration, or benefit. Whether action or inaction, ignorance or knowledge, or like or dislike caused the deprivation is irrelevant.").

<sup>253</sup> *See* STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED* 19-20 (1996).

<sup>254</sup> Black, *supra* note 233, at 569.

<sup>255</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-26, 328-44 (1987).

<sup>256</sup> *Id.* at 324.

<sup>257</sup> Delgado, *supra* note 245, at 2295.

other maintaining a system of white privilege, and that ending one without dismantling the other would not result in racial equality.<sup>258</sup>

Subordination can take many subtle and complex forms other than intentional government action to harm minorities.<sup>259</sup> The disadvantages of minorities in modern times do not primarily arise from government action designed to harm minorities, but rather from structures of inequality that government action subsequently maintains and reinforces.<sup>260</sup> Ultimately, the Court's current focus on intentional discrimination does not recognize the multifaceted nature of discrimination when defining a violation of equal protection and instead narrows that definition to action intended to harm a group or individual.<sup>261</sup>

In addition to overlooking other forms of discrimination, intent can be very difficult to prove, and oftentimes victims of discrimination do not possess such evidence.<sup>262</sup> Also, the intentional discrimination model cannot effectively explain persistent disparities in education, housing, employment, and other areas of American life.<sup>263</sup> The antidiscrimination model labels these disparities societal discrimination and denies governments the ability to use a racial classification to remedy them.<sup>264</sup>

Focusing on intentional discrimination also limits the response to discrimination. Under the intentional discrimination standard, equal protection requires governments merely to remedy the harm to the victim,<sup>265</sup> not to try to dismantle longstanding manifestations of dis-

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<sup>258</sup> See WILDMAN ET AL., *supra* note 253, at 19-20.

<sup>259</sup> Colker, *supra* note 245, at 1008-10; Hutchinson, *supra* note 245, at 683-84; Walsh, *supra* note 247, at 698.

<sup>260</sup> See generally Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000); Roithmayr, *supra* note 251.

<sup>261</sup> See Black, *supra* note 233, at 569; Delgado, *supra* note 245, at 2295; Lawrence, *supra* note 255, at 324.

<sup>262</sup> Hutchinson, *supra* note 245, at 686; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290-91 (1997).

<sup>263</sup> See Roithmayr, *supra* note 251, at 200 ("Because the intent standard model focuses exclusively on intentional stereotyping, the model is poorly equipped to explain the persistent disparities in housing, schooling, income and employment . . .").

<sup>264</sup> See *Croson*, 488 U.S. at 505; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."); Roithmayr, *supra* note 251, at 200.

<sup>265</sup> See Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 614 (2008); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1595 (1996). Volpp says:

crimination and racism.<sup>266</sup> The antidiscrimination model also fails to recognize the “structural privileges granted to members of the majority which do not, by nature, operate on an individualized basis.”<sup>267</sup>

Another shortcoming of the Court’s current approach to equal protection is that it uniformly applies the same strict scrutiny to claims that benefit disadvantaged groups as to those that seek to harm them.<sup>268</sup> The plurality in the 1989 case *City of Richmond v. J.A. Croson Co.* stated that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”<sup>269</sup> The antidiscrimination framework focuses solely on the individual victim of discrimination and views the right to be free from discrimination as a personal right without consideration of “the historical or aggregated position” of an individual.<sup>270</sup> This approach divorces equal protection analysis from the context and meaning of race and race relations in the United States, including how some have been advantaged by race.<sup>271</sup> Scholars also have described how the Court’s current approach to equal protection fosters white racial domination and minority subordination.<sup>272</sup>

Because the Court currently interprets the Equal Protection Clause to view racial subjugation and race-based action to remedy dis-

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[T]he antidiscrimination principle looks only to whether a process was fair, and not at its outcome; looks at a specific act or omission and not its context; treats racism as an individual problem, rather than as a societal one; and privatizes racism, so that remedies are meted out solely on the level of the individual.

See Volpp, *supra*, at 1595.

<sup>266</sup> See Delgado, *supra* note 245, at 2289 (“Instead of looking for more refined levels of intent and unconscious motivation—a ghost in the machine—why not look to see what the machine is doing and take steps to dismantle it?”); Hutchinson, *supra* note 245, at 684; Roithmayr, *supra* note 251, at 200.

<sup>267</sup> Walsh, *supra* note 247, at 698.

<sup>268</sup> See *Croson*, 488 U.S. at 493 (plurality opinion) (applying strict scrutiny to an affirmative action plan to benefit minorities).

<sup>269</sup> *Id.* at 494.

<sup>270</sup> Campos, *supra* note 265, at 589–90.

<sup>271</sup> See *id.* at 590; Powell, *supra* note 247, at 199; Girardeau A. Spann, *Affirmative Inaction*, 50 How. L.J. 611, 635 (2007); Volpp, *supra* note 265, at 1594–95.

<sup>272</sup> See Gotanda, *supra* note 245, at 2–3 (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”); Powell, *supra* note 247, at 195 (“Through an unrealistically acontextual assessment of racism in America, the principle of colorblindness perpetuates racial subordination.”); Spann, *supra* note 271, at 635 (“The Court, therefore, reads the constitutional concept of equality as something that entitles Whites to retain the surfeit of resources that they presently possess, notwithstanding the discriminatory manner in which those resources were obtained.”).

crimination with equal hostility,<sup>273</sup> the effect of this approach has been to find unconstitutional those government programs that seek to accomplish a more just distribution of societal resources.<sup>274</sup> Thus, one of the principal shortcomings of this approach is that it "denies the promises of equality to vulnerable social groups, despite the anticaste origins of the Fourteenth Amendment," as Darren Hutchinson astutely argues.<sup>275</sup> He has explained how "[t]he Court's elaboration of equality has transformed the Equal Protection Clause from a beacon of hope for oppressed communities into a document that blocks governmental efforts to remedy subjugation and that effectively requires governmental actors to treat oppressed classes maliciously in order to violate its provisions."<sup>276</sup> When considered along with the intentional discrimination requirement, the Court's current approach to equal protection denies a finding of discrimination against vulnerable groups when intentional discrimination cannot be shown while subjecting to a heightened level of scrutiny legislative action that seeks to address discriminatory patterns through application of a racial classification.<sup>277</sup>

In contrast to the current equal protection framework, an antisubordination interpretation of equal protection enjoys substantial advantages over the Court's current approach to equal protection. Antisubordination analysis moves beyond formal equality to examine whether a law advances substantive equality by analyzing "the concrete effects of government policy on the substantive condition of the disadvantaged."<sup>278</sup> An antisubordination approach invalidates government action that reaffirms the existing disadvantage of historically oppressed groups.<sup>279</sup> It supports government action that challenges the existing

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<sup>273</sup> López, *supra* note 247, at 987-88.

<sup>274</sup> See Hutchinson, *supra* note 245, at 646; Spann, *supra* note 271, at 635.

<sup>275</sup> Hutchinson, *supra* note 245, at 681.

<sup>276</sup> *Id.* at 699.

<sup>277</sup> Colker, *supra* note 245, at 1058-59; Hutchinson, *supra* note 245, at 699.

<sup>278</sup> Roberts, *supra* note 245, at 1454; see also Delgado, *supra* note 245, at 2295-96 ("Whether an action or structure contributes to material oppression seems a much more fruitful, and ultimately, worthy way of addressing America's most intractable and complex problem: race."); Siegel, *supra* note 245, at 1547 (noting that her complex account of history and constitutional principles "teaches that concerns about group subordination are at the heart of the modern equal protection tradition—and, at the same time, suggests important reasons why such concerns have been persistently disguised, qualified, and bounded").

<sup>279</sup> See Hutchinson, *supra* note 245, at 692; Siegel, *supra* note 245, at 1472-73, 1547; see also *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting) ("For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full

disparity in power between whites and minorities.<sup>280</sup> Among the possible interpretations of equal protection, antistatutory best "dismantle[s] the historical legacy of racial and other forms of domination."<sup>281</sup> Antistatutory analysis would lead the judiciary to respect (but not abdicate review of) government action that seeks to remedy subordination while also closely scrutinizing those policies that reinforce it.<sup>282</sup>

An antistatutory framework would also provide redress for the adverse effect of government policies on particular groups and move away from the Court's current emphasis on the intent of the government actor as the touchstone for defining an equal protection violation.<sup>283</sup> It would also recognize that subordination changes over time and it would appropriately seek to remedy new forms of subordination.<sup>284</sup> For example, it would acknowledge that neutral policies can contain illegitimate biases that harm and stigmatize and thus require action to address such neutral policies.<sup>285</sup>

The antistatutory framework moves beyond the antidiscrimination focus on remedying the harm to the victim and instead enables governments to take a wider array of action to address subordination.<sup>286</sup> This results from antistatutory's scrutiny of social structures and practices and how they affect the societal position of individuals.<sup>287</sup> It would require government actors to remedy subordinating structural inequalities.<sup>288</sup> For example, an antistatutory analysis might guide governments to take prospective action to remedy subor-

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members those whom the Nation had previously held in slavery." (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872))).

<sup>280</sup> Colker, *supra* note 245, at 1007.

<sup>281</sup> Hutchinson, *supra* note 245, at 682.

<sup>282</sup> See *id.* at 699; Powell, *supra* note 247, at 227.

<sup>283</sup> Colker, *supra* note 245, at 1014–15.

<sup>284</sup> Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9, 15 (2003) ("[T]he question whether a practice violates an antistatutory principle depends heavily on factual and historical contexts, and, in particular, on the laws and social mores that prevail in a given society at a given moment in history."); Hutchinson, *supra* note 245, at 683–84.

<sup>285</sup> Hutchinson, *supra* note 245, at 684.

<sup>286</sup> See Campos, *supra* note 265, at 592, 614; Volpp, *supra* note 265, at 1594–95.

<sup>287</sup> Campos, *supra* note 265, at 588; Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 1018 (2006) ("The anti-subordination principle acknowledges the different ways in which structures interact to keep protected classes subjugated."); Walsh, *supra* note 247, at 698 (noting the Court's refusal to address structural privileges and that "[t]he better approach would be to look for ways to create structural diversity," which would "break down those structural privileges and act to create diverse relationships").

<sup>288</sup> Campos, *supra* note 265, at 593; Hutchinson, *supra* note 245, at 683; Walsh, *supra* note 247, at 698.

dination, maintain a continuous attack on subordinating policies without the deadlines imposed on affirmative action policies, and review the influence of institutions that contributed to the subordination rather than simply the directly subordinating institution.<sup>289</sup> The approach seeks to dismantle racism and economic inequities rather than uncover their motivations, even the unconscious ones.<sup>290</sup>

Though the anticlassification framework has dominated the Court's equal protection jurisprudence, it is "not compelled or even suggested by the language of the [Equal Protection Clause]," nor is it "securely rooted in the legislative history of the Clause."<sup>291</sup> Further, accepting the anticlassification theory does not require the categorical rejection of the antisubordination theory.<sup>292</sup> Indeed, scholars have suggested that the two theories overlap to an extent and that, though anticlassification has dominated jurisprudence, its development and application have been informed and influenced by latent antisubordination principles.<sup>293</sup>

The underlying presence of the antisubordination theory manifests itself in the case law. Ruth Colker has contended that *Brown* implicitly embraced an antisubordination framework by focusing on the harmful effect of segregated schooling on minority children.<sup>294</sup> Reva Siegel has suggested that *Brown* did not embrace the current anticlassification approach and reject an antisubordination framework; instead it came to be characterized as an anticlassification case in response to social conflict and political pressures surrounding the interests advanced

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<sup>289</sup> Campos, *supra* note 265, at 614, 627-29.

<sup>290</sup> See Delgado, *supra* note 245, at 2296 ("It is time to move away from limited conceptions of racism located in the individual psyches of particular perpetrators and to begin the search for broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfill our unkept promises of democracy, equality, and a decent life.").

<sup>291</sup> Fiss, *supra* note 233, at 118-19.

<sup>292</sup> See Balkin & Siegel, *supra* note 284, at 10-11.

<sup>293</sup> *Id.*; see also Pager, *supra* note 247, at 289 ("Appreciating the shortcomings of each of these paradigms on their own paves the way for an integrated understanding of equality in which antisubordination values give normative content to antidiscrimination doctrine."); Siegel, *supra* note 245, at 1542-43 ("Antisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values, including the need to have a Constitution that speaks to all.").

<sup>294</sup> See, e.g., Colker, *supra* note 245, at 1014, 1022 n.71 (quoting *Brown I*, 347 U.S. at 494); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 531 (1997) (stating that many academics have viewed *Brown v. Board of Education* as resting on an antisubordination principle because the harm resulted from the imposition of segregation on the black minority by the white majority).

by *Brown* and the limits on the reach of school desegregation.<sup>295</sup> She contends that

[i]t is not simply that antisubordination values played a central role in justifying *Brown* throughout the 1950s, or that, during the 1960s and 1970s, antisubordination values were expressed through, and guided application of, the presumption that racial classifications are unconstitutional. It is that, even in the 1970s, when the Court began to use anticlassification discourse to limit rather than express antisubordination values, it never embraced one understanding of equal protection to the exclusion of the other.<sup>296</sup>

Scholars have elucidated how additional case law, including *Grutter*, reveals antisubordination influences.<sup>297</sup> *Grutter* can be interpreted as having included elements of an antisubordination framework when it recognized a compelling interest in considering the race of law school applicants so as to avoid systematically closing doors to positions of leadership on any group.<sup>298</sup> Simultaneously, however, the Court cloaked its reliance on antisubordination with anticlassification rhetoric.<sup>299</sup> Darren Hutchinson has argued that the oft-cited footnote four in *United States v. Carolene Products*, which suggested that judicial review might protect "discrete and insular minorities" from prejudice,<sup>300</sup> evidenced an antisubordination approach.<sup>301</sup> The Court's language, he argued, parallels the antisubordination approach in focusing on a law's effect on disadvantaged groups.<sup>302</sup>

Additional scholars have noted how other Supreme Court opinions reflect antisubordination principles.<sup>303</sup> Scholars also have argued

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<sup>295</sup> Siegel, *supra* note 245, at 1481–99.

<sup>296</sup> *See id.* at 1537.

<sup>297</sup> *See, e.g., id.* at 1539 (analyzing how *Grutter's* recognition of diversity as a compelling interest relies upon an antisubordination framework); *see also* Hutchinson, *supra* note 245, at 683, 692–93 (describing how the reasoning in the oft-cited footnote four in *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) provides support for an antisubordination approach).

<sup>298</sup> *See* Siegel, *supra* note 245, at 1481–99.

<sup>299</sup> *See id.*

<sup>300</sup> 304 U.S. at 153 n.4.

<sup>301</sup> Hutchinson, *supra* note 245, at 683, 692–93.

<sup>302</sup> *Id.*

<sup>303</sup> *See, e.g.,* Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1168, 1171–72, 1246–47 (2004) (citing *Lawrence v. Texas*, 539 U.S. 558 (2002); *Romer v. Evans*, 517 U.S. 620 (1996); *Plyler v. Doe*, 457 U.S. 202 (1982); *Loving*, 588 U.S. 1) (noting the influence of antisubordination principles in *Loving*, *Plyler*, *Romer*, and *Lawrence*); Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitu-*



that an antisubordination framework does or should influence the understanding of the anticlassification framework.<sup>304</sup> Moreover, in *Parents Involved*, when Justice Kennedy contends that schools are not required to ignore racial isolation and notes the nation's continued obligation to create an integrated nation that guarantees equal opportunity, he moves beyond anticlassification's focus on intentional discrimination to embrace government action to remedy social conditions that have a subordinating effect consistent with an antisubordination framework.<sup>305</sup>

Finally, and most importantly, this Article embraces an antisubordination approach to equal protection because the education of schoolchildren involves a particularly appropriate setting to apply an antisubordination framework. The importance of education in American society has only grown since the Court noted its paramount importance in *Brown*.<sup>306</sup> The education a child receives sets the foundation for the child's future employment, health, housing, and social opportunities. Application of an antisubordination framework in education would focus government attention on achieving substantive equality in educational opportunities and dismantling structural inequality in education, which in turn would help to level the playing field in other aspects of society.<sup>307</sup>

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tionality of K-12 Single-Sex Public Schools, 1999 U. CHI. LEGAL F. 381, 384 (arguing that the Court articulated an asymmetrical antisubordination principle in *United States v. Virginia*); Saucedo, *supra* note 287, at 1019 (arguing that *Griggs v. Duke Power* includes elements of antisubordination because the Court required facially neutral policies that impose an adverse impact on a protected group to be justified by business necessity only if less burdensome alternatives are unavailable).

<sup>304</sup> E.g., Pager, *supra* note 247, at 289 ("Appreciating the shortcomings of each of these paradigms on their own paves the way for an integrated understanding of equality in which antisubordination values give normative content to antidiscrimination doctrine."); Siegel, *supra* note 245, at 1477 ("Antisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values, including the need to have a Constitution that speaks to all.").

<sup>305</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and in the judgment). The next section of this Article explains why racial isolation in schools has a subordinating effect. See *infra* notes 308-359 and accompanying text.

<sup>306</sup> See 347 U.S. at 493; see also *Powell v. Ridge*, 189 F.3d 387, 405 (3d Cir. 1999) ("We need no long list of citations to note the widespread recognition of the importance of a good public school education for all of our young people—rich and poor, black and white.").

<sup>307</sup> See HORACE MANN, *Report for 1848*, in 4 LIFE AND WORKS OF HORACE MANN 222, 251 (1867).

B. *The Subordinating Effect of Racial Isolation, the Benefits of Integrated Schools, and Examples of Race-Neutral Student Assignment Plans*

In *Parents Involved*, Justice Kennedy described *Brown*'s objective as one of "equal educational opportunity," and, in furthering that objective, he noted that districts do not have to accept racial isolation in the schools.<sup>308</sup> He also contended that

[i]f school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-neutral measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.<sup>309</sup>

These statements implicitly acknowledge that racial isolation in schools can deny equal educational opportunity.<sup>310</sup>

Nevertheless, students today increasingly attend schools that are racially isolated. From the 1980–81 school year to the 2005–06 school year, the percentage of black students attending schools in which a majority of the students are minorities rose from 63 to 73 percent.<sup>311</sup> Similarly, the percentage of Latino students attending majority-minority schools rose from 68 to 78 percent.<sup>312</sup> Although the attendance of African American students in majority white schools rose steadily beginning in the late 1960s and peaked in 1988 at 43.5 percent, by 2005 only slightly more than a quarter (27 percent) of African American students attended such schools.<sup>313</sup> The percentage today is only slightly higher than the 23.4 percent of African American students who attended majority white schools in 1968, when the nation's school desegregation efforts were still in their nascent stages.<sup>314</sup> Although southern and border states formerly experienced the greatest integration, currently these regions are experiencing the largest increases in racial isolation.<sup>315</sup>

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<sup>308</sup> *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and in the judgment).

<sup>309</sup> *Id.* at 2792.

<sup>310</sup> *See id.* at 2791–92.

<sup>311</sup> ORFIELD & LEE, *supra* note 2, at 28.

<sup>312</sup> *Id.* at 34.

<sup>313</sup> *Id.* at 23.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 33.

Although Justice Kennedy does not explain why a racially isolated educational environment could deny equal educational opportunity, this Article contends that avoiding racial isolation and promoting diversity remains an important component of equal educational opportunity because, as shown below, racially isolated educational settings offer inferior educational opportunities to their students and produce inferior outcomes, while diverse educational settings reap important benefits.<sup>316</sup> Thus, racial isolation in schools can deny equal educational opportunity because it exerts a subordinating effect on the inputs for and outputs from such schools.<sup>317</sup> *Brown* unequivocally declared that "in the field of public education the doctrine of 'separate but equal' has no place," and that "[s]eparate educational facilities are inherently unequal."<sup>318</sup> Today, even without the imprimatur of a law or official policy that explicitly seeks to divide students along racial lines and provide minority students substandard educational opportunities, racially isolated schools remain inferior to other schools.<sup>319</sup> Therefore, even as many communities strive to provide excellent educational opportunities to students in schools that may not become integrated,<sup>320</sup> if the nation seeks to pursue equal educational opportunity and respond to Justice Kennedy's clarion call in *Parents Involved*,<sup>321</sup> avoiding racial isolation and promoting diversity must remain on its agenda. Therefore, this Article disagrees with those that argue that continuing to focus on *Brown*'s vision for creating racially integrated schools currently is of little import<sup>322</sup> and instead joins the chorus of scholars that call for renewed efforts to integrate the nation's schools.<sup>323</sup>

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<sup>316</sup> See *infra* notes 324–351 and accompanying text.

<sup>317</sup> See *infra* notes 324–351 and accompanying text.

<sup>318</sup> *Brown I*, 347 U.S. at 495.

<sup>319</sup> See, e.g., Wells & Frankenberg, *supra* note 5, at 180–83.

<sup>320</sup> It is worth noting that this Article's examination of the harms of racial isolation and the benefits of integration does not deny that some schools that are racially isolated have achieved some effective educational outcomes. Nevertheless, racially isolated schools that produce high academic achievement represent the exception, and such schools have a limited ability to accomplish the broader civic objectives of schools, such as teaching students to work with those unlike themselves. See JENNIFER HOCHSCHILD & NATHAN SCOVORICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 14 (2003).

<sup>321</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.").

<sup>322</sup> See, e.g., Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1053, 1064 (2005) (arguing that "[t]he *Brown* decision, as far as the law is concerned, is truly dead and beyond resuscitation" and that "[t]he good news

## 1. The Harms of Racial Isolation and the Benefits of Integration

Numerous scholars have provided a comprehensive review of the research on racial isolation and the benefits of integrated school settings, including the nonpartisan National Academy of Education, which conducted an independent analysis of the social science research cited in the many amicus briefs in the *Parents Involved* litigation.<sup>324</sup> This section builds on those reviews by noting their principal findings along with those of other research on the harms of racial isolation and the benefits of diversity.<sup>325</sup> This section then briefly provides examples of some of the

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today is that educators and parents are ignoring the siren song that integration is an essential component of a good school").

<sup>323</sup> See, e.g., Gary Orfield, *Why Segregation Is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. 1041, 1052 (2005) ("Society must recognize that *Plessy* and the doctrine of 'separate but equal' has never worked, and society, the courts, and the government must work together to end school segregation wherever feasible."); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1997) (arguing that a "quality education," informed by *Brown*, is not possible without integration. Education teaches more than math and verbal skills; it fosters emotional skills as well," and, further, that "a full set of emotional talents cannot be gained in the context of involuntary segregation").

<sup>324</sup> See generally NAT'L ACAD. OF EDUC., *supra* note 41; Jon Mills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (James A. Banks & Cherry A. McGee Banks eds., 2004); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998); Wells & Frankenberg, *supra* note 5 (reviewing the research on harms of racial isolation documented in the hundreds of studies cited in the *Parents Involved* Supreme Court amicus briefs). For additional reviews of the literature, see generally Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, *supra*, at 597; Erica Frankenberg, *Voluntary Integration After Parents Involved: What Does Research Tell Us About Available Options?* (Dec. 3, 2007) (unpublished manuscript, on file with author).

<sup>325</sup> Although most of the literature reviews repeatedly note when they are relying on studies that controlled for the socioeconomic status of students, most of the reviews do not appear to limit their analyses solely to studies that control for socioeconomic status. The National Academy of Education analysis did note that most researchers included a set of control variables in the studies they reviewed, but it also acknowledged that early studies did not have an effective way to separate other factors from the impact of segregation in schools. See NAT'L ACAD. OF EDUC., *supra* note 41, at 15. This analysis further commented that the effectiveness of research with control variables to measure the impact of diversity depended on how well the controls captured the myriad factors that influence student outcomes. See *id.* When the reviews do not exclude studies that control for socioeconomic status they might, for example, be finding harms from racial isolation that are due to the concentrated poverty that typically accompanies racial isolation. See ORFIELD & LEE, *supra* note 2, at 29–30 (noting that concentrated poverty typically accompanies racial isolation). Conversely, when the reviews do not exclude studies that control for socioeconomic status, they might be attributing benefits to racial integration that arise because of socioeconomic integration. Given the repeated reliance on and reference to studies that do control for socioeconomic status and the consistency of the findings across reviews, however, the exis-

race-neutral approaches that districts have adopted for avoiding racial isolation and enhancing diversity.<sup>326</sup>

Research establishes that racially isolated schools offer inferior educational opportunities and produce inferior outcomes.<sup>327</sup> Racially isolated schools suffer from substandard educational resources in critical ways. For example, although access to good teachers represents "the most important educational resource that schools can provide," racially isolated schools experience higher levels of teacher turnover and employ less experienced and less qualified teachers.<sup>328</sup> Research also confirms that inexperienced teachers negatively impact student outcomes.<sup>329</sup> Predominantly African American and Latino schools also offer fewer classes

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tence of harms and benefits from integration are well-established, although the magnitude of the harms of racial isolation and the benefits of integration may not be precisely defined in the research. See NAT'L ACAD. OF EDUC., *supra* note 41, at 18 (noting that, after using controls for the effect of peers, socioeconomic background, and the characteristics of teachers, researchers consistently find that the concentration of African American students significantly and adversely impacts student achievement and that this is particularly so for African American students); Hallinan, *supra* note 324, at 741-42 ("The data generally are analyzed using statistical models that control for relevant background factors, including socioeconomic status, gender, and ability, as well as school factors, such as school sector (public or private), school size, and geographic locale. The results of these studies are remarkably consistent. In general, these studies support [the findings that b]lack students attain higher academic achievement in majority white schools than in predominantly or majority black schools [and that t]he earlier a black student is placed in a majority white school or classroom, the higher the student's academic achievement."); see also Bradley W. Joondeph, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 192 (1999) ("[T]hose studies that have attempted to isolate the effects of desegregation have generally found that, controlling for such relevant variables as the student's socioeconomic background and preexisting ability, school desegregation produces a modest but statistically significant increase in achievement for minority children with no detriment to white children."). In addition, any research discussed or cited in this Article apart from the literature reviews controlled for the socioeconomic status of students. Finally, many other factors inside and outside of schools also influence student achievement, such as school resources, access to curriculum, and parents' educational background. Studies vary in how and whether they control for such factors, which may account for the substantial variation in estimates of the impact of racial segregation and integration. See NAT'L ACAD. OF EDUC., *supra* note 41, at 15-16.

<sup>326</sup> See *infra* notes 360-417 and accompanying text.

<sup>327</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 18; Wells & Frankenberg, *supra* note 5, at 180-83.

<sup>328</sup> Wells & Frankenberg, *supra* note 5, at 180-81; see also NAT'L ACAD. OF EDUC., *supra* note 41, at 20 (noting the higher teacher turnover and less experienced teachers at schools with high concentrations of minority students); Roslyn Arlin Mickelson, *The Effects of Segregation on African American High School Seniors' Academic Achievement*, 68 J. NEGRO EDUC. 566, 577 (2001) (noting that teachers in racially isolated black schools in Charlotte, North Carolina, were more likely to be new and untenured and less likely to be fully licensed and to possess a master's degree, and that racially isolated Black schools offer "disproportionately fewer" human and material resources).

<sup>329</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 20.

that prepare students for college, such as Advanced Placement and honors classes.<sup>330</sup>

In addition to inferior inputs, racial segregation also negatively affects academic outcomes.<sup>331</sup> For instance, the National Academy of Education's review of research on the impact of racial isolation and desegregation noted that several "researchers find that, after controlling for factors such as socioeconomic status, peer effects, and teacher characteristics, the school-level percentage of African American students substantially and negatively affects student achievement, particularly the achievement of other African American students."<sup>332</sup> Other research notes that schools with a larger percentage of African American and La-

<sup>330</sup> See Wells & Frankenberg, *supra* note 5, at 181.

<sup>331</sup> See, e.g., NAT'L ACAD. OF EDUC., *supra* note 41, at 18.

<sup>332</sup> *Id.*; see Braddock & Eitle, *supra* note 324, at 831 ("[R]esearch on the effects of desegregation on student academic achievement, measured by standardized tests, seems to support the proposition that African American and Hispanic students learn somewhat more in schools that are majority White as compared to their academic performance in schools that are predominantly non-White."); Hallinan, *supra* note 324, at 741-42 (1998) (noting that studies consistently find that "[b]lack students attain higher academic achievement in majority white schools than in predominantly or majority black schools"); see also, e.g., Doris R. Entwisle & Karl L. Alexander, *Summer Setback: Race, Poverty, School Composition, and Mathematics Achievement in the First Two Years of School*, 57 AM. SOC. REV. 72, 82 (1992) (finding in a study of students in Baltimore that "after two years in segregated schools, there is a 17-point gap between whites and African-Americans who started with the same score . . . , while after two years in integrated schools, the 12-point advantage for whites that whites enjoyed from the start is unchanged"); Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 J. POL'Y ANALYSIS & MGMT. 297, 312 (2005) (finding in a national study that the "[h]igher minority concentrations have a statistically significant negative impact on Blacks" in their student achievement outcomes on the National Assessment of Educational Progress); Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 239 (2001) (finding in a study of schools in Charlotte-Mecklenburg, North Carolina, that "[t]he greater the proportion of a student's elementary school education that takes place in a racially isolated Black elementary school, the lower the student's scores on standardized tests and the lower her or his track placement in secondary school"); Mickelson, *supra* note 328, at 577 (finding in a study of schools in Charlotte-Mecklenburg, North Carolina, that attending a racially isolated black elementary school has "a small but significant" adverse effect on high school achievement); Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* 3 (2007) (unpublished manuscript, on file with Hoover Institution) (finding in a study of Texas students that "the black enrollment share adversely affects achievement, and its effects are roughly twice as large for blacks as for whites" but finding that the concentration of Hispanic students exerts a substantially smaller, almost negligible influence on student achievement). The Entwisle and Alexander study found that the class differences "clearly overshadow school racial settings in explaining minority/majority differences." Entwisle & Alexander, *supra*, at 82.

tino students promote fewer students to the next grade each year.<sup>333</sup> After controlling for socioeconomic status and prior test scores, research suggests that students who attended schools with predominantly minority student bodies also are less likely to graduate from college.<sup>334</sup> Research also supports the conclusion that early experiences in segregated schools tend to lead adults to live mostly segregated lives.<sup>335</sup>

Scholars offer several explanations for why racially isolated schools produce inferior outcomes. A 2007 survey of the research on the harms of racial segregation by Amy Stuart Wells and Erica Frankenberg notes that racially isolated schools exist within broader societal structures that are relatively deficient in health care, housing, and employment opportunities along racial lines, and these structures converge to impact adversely the educational opportunities for students attending racially isolated schools.<sup>336</sup> The racial identity of a school also matters because "the racial makeup of a school or neighborhood is still a marker of its status in . . . society" and parents often assess whether to send their child to a school in racial terms.<sup>337</sup>

Research from the Civil Rights Project documents how racially isolated schools experience high concentrations of poverty, which brings to schools a variety of inequalities that result in inferior educational opportunities for their students.<sup>338</sup> For instance, concentrated poverty brings to the schoolhouse door "less qualified, less experienced teachers, lower

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<sup>333</sup> Wells & Frankenberg, *supra* note 5, at 182; *see also* Mickelson, *supra* note 328, at 577 (finding that attending a black elementary school had a negative effect on students' grades in high school and that the longer that a student spent in a segregated black elementary school, the less likely it was that the child would be placed in a college-bound course of study).

<sup>334</sup> Eric M. Camburn, *College Completion Among Students from High Schools Located in Large Metropolitan Areas*, 98 AM. J. EDUC. 551, 559-60 (1990) ("High school racial composition, as measured by the percentage of whites in a student's high school, was found to be the strongest predictor [of college graduation] among all high school characteristics studied."); Wells & Frankenberg, *supra* note 5, at 182.

<sup>335</sup> *See* Braddock & Eitle, *supra* note 324, at 833 ("There has been an accumulation of strong and consistent research evidence that both majority and minority individuals whose childhood experiences, in schools and neighborhoods, take place in largely segregated environments are likely to also lead their adult lives in largely segregated settings."); *see also* NAT'L ACAD. OF EDUC., *supra* note 41, at 32 (noting an association between early attendance at a desegregated school and living and working in integrated settings).

<sup>336</sup> Wells & Frankenberg, *supra* note 5, at 180 ("[T]here is strong evidence that the broader context of racial inequality in housing, labor, health care, and education—what sociologies call 'structural inequality'—has a Jim Crow-like effect on public schools, ensuring that they remain separate and unequal in many important ways.")

<sup>337</sup> *Id.* at 184-85.

<sup>338</sup> *See* ORFIELD & LEE, *supra* note 2, at 29-30 (noting that concentrated poverty typically accompanies racial segregation).

levels of peer group competition, more limited curricula taught at less challenging levels, more serious health problems, much more turnover of enrollment, and many other factors that seriously affect academic achievement.<sup>339</sup> James Ryan has noted additional disadvantages that low-income students suffer, including inadequate health care and nutrition, little parental involvement, the absence of an engaging home environment, greater mobility, and more experience with drugs and violent behavior.<sup>340</sup> Although close to three-quarters of black and Latino students attend “high-poverty schools”—schools where more than 40 percent of the students qualify to receive a free or reduced-price lunch—only slightly more than a quarter of white students attend such schools.<sup>341</sup>

The research on diverse or integrated schools indicates that such schools can provide important benefits.<sup>342</sup> Substantial research sup-

<sup>339</sup> See *id.* at 29; see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 974 (2004) (“Study after study documents that high-poverty and high-minority schools have less qualified and experienced teachers.”).

<sup>340</sup> James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 285 (1999) (citing GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION* 54 (1996)).

<sup>341</sup> Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 19 (The Civil Rights Project, 2005), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Why\\_Segreg\\_Matters.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf).

<sup>342</sup> See NAT’L ACAD. OF EDUC., *supra* note 41, at 20; Braddock & Eitle, *supra* note 324, at 839 (“There appears to be growing agreement among researchers that the opportunity to learn with and from people from different racial and ethnic backgrounds can, under the right conditions, enhance students’ academic achievement and cognitive development, increase cross-cultural competence, and promote dispositions and behaviors that will have economic and social consequences for individuals and communities. . . . However, research that directly links learning in diverse schools to student outcomes—both long term and short term—is not extensive, and much of this research was conducted many years ago and deals largely with African American-White relationships.”); Hallinan, *supra* note 324, at 741–42 (finding that studies consistently show that black students perform better academically in schools where more than half of the students are white than in schools where a majority or predominance of the students are black and that “[r]elated research shows that the advantage of a white majority school for minority students is intensified when the white students are middle class and when minority students become friends with their white peers”); Wells & Frankenberg, *supra* note 5, at 179 (“There is a large body of research that examines the lives of students who experienced school desegregation and finds both short-term benefits (in academics and intergroup relations) and long-term benefits (increased mobility for students of color, positive racial attitudes, and higher comfort levels in racially diverse settings.”); see also Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV. 919, 932 (2004) (finding in a study of 125 large urban school districts that “[t]he results suggest that black high school dropout rates declined more in districts . . . that were more effectively integrated under desegregation plans”); Hanushek, Kain & Rivkin, *supra* note 332, at 29 (finding in a study of Texas students that equalizing the racial composition of schools “would reduce the race achievement gap by roughly 13 percent”); David A. Weiner, Byron F. Lutz & Jens Ludwig, *The Effects of School Desegregation on Crime* 38–39 (Dec. 29, 2006) (unpublished manuscript, on file with author), available at [http://www.aeaweb.org/annual\\_mtg\\_papers/2007/0107\\_1300\\_0303.pdf](http://www.aeaweb.org/annual_mtg_papers/2007/0107_1300_0303.pdf) (finding in



ports the finding that the achievement of African American students improves in less segregated schools, particularly in the early grades, although scholars debate the magnitude of this impact, finding only modest or occasional gains.<sup>343</sup> For example, Jomills Braddock and Tamela Eitle's extensive literature review found that "research on the effects of desegregation on student academic achievement, measured by standardized tests, seems to support the proposition that African American and Hispanic students learn somewhat more in schools that are majority White as compared to their academic performance in schools that are predominantly non-white."<sup>344</sup> The National Institute for Education's literature review similarly concluded that

although the apparent magnitude of the influence is quite variable, there is a relatively common finding that African American student achievement is enhanced by less segregated schooling. . . . [T]hese positive effects for African American students tend to be larger in earlier grades than in later grades and larger in studies using experimental designs or

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a national study that "estimates suggest that court-ordered school desegregation reduces homicide victimization by around 20 percent for black youth and up to 35 percent for white youth" and that "school desegregation at least on average generates beneficial and quite sizable improvements in youth crime"). Research also indicates that socioeconomic status influences academic achievement more than the racial composition of schools. See Hallinan, *supra* note 324, at 743. This finding suggests that efforts to focus on racial and class integration would yield greater gains for academic achievement for minority students than focusing on either factor alone.

<sup>343</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 20; Braddock & Eitle, *supra* note 324, at 829-31; Ryan, *supra* note 340, at 297 ("The popular view of desegregation is that it only occasionally helps boost academic achievement among minority students and only occasionally improves race relations."). The research also reveals that whites are not harmed by desegregation efforts. See NAT'L ACAD. OF EDUC., *supra* note 41, at 20; Braddock & Eitle, *supra* note 324, at 829, 831. Some research indicates that the benefits of integration accrue in reading but not in math. See Schofield, *supra* note 324, at 610 ("[R]esearch suggests that desegregation has had some positive effect on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. Such is not the case with mathematics skills . . ."); see also Braddock & Eitle, *supra* note 324, at 829 ("Extensive research and careful and increasingly sophisticated reviews show that the academic performances of Whites and African Americans are not harmed in desegregated schools and that African Americans typically show achievement gains, especially in reading, as a result of school desegregation." (emphasis added)). However, other research finds that African American children do better in math at integrated schools. See Entwisle & Alexander, *supra* note 332, at 82.

<sup>344</sup> Braddock & Eitle, *supra* note 324, at 831.

longitudinal data sets than in cross-sectional studies or studies that lack control groups.<sup>345</sup>

Other research has shown that the benefits of diversity result from educators' efforts to enhance the opportunity for contact between students in ways that foster superior outcomes, rather than simply placing students from different racial backgrounds into the same school without attention to how and when students interact.<sup>346</sup>

Although diverse schools cannot ensure that intergroup relations improve, research suggests that such schools can still be constructive in supporting this goal.<sup>347</sup> For instance, research on the short-term effects of desegregation on socialization and intergroup relations has yielded mixed outcomes, though recent students have shown positive outcomes from diverse classrooms, including reductions in racial prejudice.<sup>348</sup> Research on the long-term effects of desegregation found positive effects on intergroup relations, including, "[u]nder some circumstances, and

<sup>345</sup> NAT'L ACAD. OF EDUC., *supra* note 41, at 20; see also Entwisle & Alexander, *supra* note 332, at 82 (finding that, although the gap in math scores between whites and blacks in segregated Baltimore schools widened, the widening did not occur in integrated Baltimore schools).

<sup>346</sup> See Roslyn Arlin Mickelson, *How Tracking Undermines Race Equity in Desegregated Schools*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 49, 55 (Janice Petrovich & Amy Stuart Wells eds., 2005); see also NAT'L ACAD. OF EDUC., *supra* note 41, at 9 (noting that, in contrast to desegregated schools that focus on racial mixing, "[i]ntegrated schools are structured such that contact has some meaningful chance to lead to improved outcomes; any benefits of racial diversity accrue as a consequence of what educators do with regard to enhancing contact opportunities"); Hallinan, *supra* note 324, at 744 (noting that research suggests that the improved outcomes in majority white schools result from enhanced opportunities to learn rather than desegregation alone).

<sup>347</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 27; Braddock & Eitle, *supra* note 324, at 831–32.

<sup>348</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 21–27; Braddock & Eitle, *supra* note 324, at 832 (noting that the research on the short-term effects on socialization and intergroup relations "has produced mixed results," but that, in contrast to earlier research, "more recent studies of the impact of desegregated classrooms have shown that children exposed to racially diverse peers in the classroom exhibited reduced adherence to racial stereotypes and reduced racial prejudice"); Hallinan, *supra* note 324, at 745 (noting that "[t]he research is fairly consistent in reporting that black and white students in desegregated schools are less racially prejudiced than those in segregated schools" and that other studies "generally find that interracial contact in desegregated schools leads to an increase in interracial sociability and friendship"); see also Amy J. Strefling, *The Influence of Integrated and De Facto Segregated Schools on Racial Attitudes of White Students Toward African Americans* 61 (1998) (paper presented at Council for Administration Convention, available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/17/68/bb.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/68/bb.pdf) (finding from a study of a sample of sixty-four students from integrated schools and sixty-four students from segregated public schools that "students experiencing a de facto segregated public school education held less favorable attitudes toward African Americans than students who experienced an integrated public school education").

over the long term, . . . increases in the likelihood of greater tolerance and better intergroup relations among adults of different racial groups."<sup>349</sup> Research finds that early experience in desegregated schools encourages students to work or attend school in integrated settings, live in integrated neighborhoods, and express confidence in their possession of the skills needed to navigate interracial relationships.<sup>350</sup> To obtain the benefits of intergroup interactions, researchers have identified ways to foster positive intergroup interactions, including (1) ensuring that students are cooperating to achieve shared goals, (2) maintaining equal status among the participants in the group contact, (3) creating the opportunity for students to get to know other group participants as individuals, and (4) giving support for positive interactions from relevant authorities.<sup>351</sup>

Admittedly, some scholars dispute the harms of racial isolation and the benefits of integration,<sup>352</sup> but the weight of scholarly opinion sup-

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<sup>349</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 32. The National Academy of Education review notes that the vast majority of the studies did not adequately control for self-selection bias, but it found adequate support for its conclusions because a study that did adequately control for this bias found similar results. *See id.*; *see also* Braddock & Eitle, *supra* note 324, at 833 ("There has been an accumulation of strong and consistent research evidence that both majority and minority individuals whose childhood experiences, in schools and neighborhoods, take place in largely segregated environments are likely to also lead their adult lives in largely segregated settings.").

<sup>350</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 32; Braddock & Eitle, *supra* note 324, at 833-34; *see also* Hallinan, *supra* note 324, at 745 ("[S]tudies examine the effects of desegregation on students' social integration and friendships. These studies generally find that interracial contact in desegregated schools leads to an increase in interracial sociability and friendship.").

<sup>351</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 21; Braddock & Eitle, *supra* note 324, at 831.

<sup>352</sup> Some scholars dispute the findings that integrated school settings can create positive outcomes. *See* HAROLD B. GERARD & NORMAN MILLER, *SCHOOL DESEGREGATION: A LONG-TERM STUDY* 297-98 (1975) ("Analysis of standardized reading achievement data offers a picture that provides little encouragement for those who see desegregation as a panacea for reducing the achievement gap that so ubiquitously characterizes minority academic performance. While the achievement of Anglo children did not suffer, minority students showed no overall benefit."); David J. Armor, *Desegregation and Academic Achievement*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 147, 183 (Christine H. Rossell et al. eds., 2002) ("Whether one examines data from historical studies, more recent national studies, or district-level case studies, it is quite clear that the racial composition of student bodies, by itself, has no significant effect on black achievement, nor has it reduced the black-white [achievement] gap to a significant degree."); Thomas D. Cook, *What Have Black Children Gained Academically from School Integration?: Examination of the Meta-Analytic Evidence*, in *SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT* 6, 40-41 (U.S. Dep't of Educ. ed., 1984) ("On the average, desegregation did not cause an increase in achievement in mathematics."); Edgar C. Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, *LAW & CONTEMP. PROBS.*, Winter 1975, at 300, 307

ports the conclusion that racial isolation inflicts harmful effects and integration has beneficial effects.<sup>353</sup> Research establishes that racial isolation in schools inflicts a subordinating effect on students in that such schools typically offer substandard educational opportunities and produce inferior outcomes when compared to other schools.<sup>354</sup> It is this subordinating effect that denies the students equal educational opportunity.<sup>355</sup> Furthermore, the inferior opportunities and outcomes that minorities experience in racially isolated schools further exacerbate the preexisting disadvantage that minority students experience in society.<sup>356</sup> The inferior outcomes also undermine the ability of minority students to enter competitive postsecondary institutions and professional career paths.<sup>357</sup> Conversely, the research also indicates that diverse student bodies can have a beneficial effect on the academic outcomes of minority students and their life opportunities.<sup>358</sup> The evidence of the potentially harmful impact of racial isolation in schools and the benefits of diversity explains why Justice Kennedy closely linked equal educational opportunity and the racial composition of schools in *Parents Involved*.<sup>359</sup> When districts undertake race-neutral efforts to avoid racial isolation and promote diversity, they can help to ensure that students receive the equal educational opportunity guaranteed by the Equal Protection Clause. The next section explores some of the

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("The evidence on the impact of desegregation is inconsistent, but seems to warrant the conclusion that desegregation has no effect on black self-esteem, or lowers it only slightly."); Walter G. Stephan, *Improving Intergroup Relations in the Schools*, in SCHOOL DESEGREGATION IN THE 21ST CENTURY, *supra*, at 267, 271 ("The research on short- and long-term effects of desegregation makes it quite clear that desegregation is not a panacea for problems in intergroup relations."); see also Brief of David J. Armor et al. as Amici Curiae Supporting Petitioners at 9–29, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915), 2006 WL 2453607; Brief of Drs. Murphy, Rossell & Walberg as Amici Curiae Supporting Petitioners at 5–16, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908 & 05-915), 2006 WL 2459104.

<sup>353</sup> See Hallinan, *supra* note 324, at 753 (noting, among other things, that research indicates that minority students perform better academically in majority white schools and that "[n]o comparable body of research is available that contradicts the major findings of these studies or that demonstrates widespread negative effects of diversity on student learning or race and ethnic relations").

<sup>354</sup> See Wells & Frankenberg, *supra* note 5, at 182–83 ("[T]he social science research on the harms of racial segregation clearly demonstrates a powerful point made by a prior Supreme Court in the *Brown v. Board of Education* ruling: separate is inherently unequal.").

<sup>355</sup> See *id.*

<sup>356</sup> See Hutchinson, *supra* note 245, at 692; Siegel, *supra* note 245, at 1472–73, 1547.

<sup>357</sup> See Wells & Frankenberg, *supra* note 5, at 180–82.

<sup>358</sup> See NAT'L ACAD. OF EDUC., *supra* note 41, at 20, 32.

<sup>359</sup> See 127 S. Ct. at 2791–92 (Kennedy, J., concurring in part and in the judgment).

approaches that districts may adopt to pursue the benefits of diversity and to avoid the harms of racial isolation.

## 2. Race-Neutral Approaches to Avoiding Racial Isolation and Promoting Diversity

Districts that seek to avoid racial isolation and promote diversity should consider the full range of race-neutral options. These options include socioeconomic integration, restructuring school attendance boundaries, magnet schools, and interdistrict transfer programs.<sup>360</sup> A brief description of these approaches follows. For some of these approaches, the research on the effectiveness of each approach is limited because districts have only pursued such efforts for the last decade or so.<sup>361</sup> This Article notes research and outcomes on each side of the debate about these approaches.

Student assignment plans that do not consider race are likely to be less effective than those that directly consider race and consequently may leave a substantial degree of racial isolation in schools.<sup>362</sup> Piece-meal efforts to integrate schools may destabilize neighborhoods and encourage white flight because they cannot equalize the racial composition at all schools and ensure equality in the resources, staff, support, and status of the school.<sup>363</sup> Race-neutral options are far from a panacea

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<sup>360</sup> This discussion does not provide an exhaustive list of race-neutral options. For discussions of these and other race-neutral options, see ANURIMA BHARGAVA ET AL., *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION* 34-61 (2007); Heeren, *supra* note 16, at 175-87; Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 13-18 (2007). Districts also might consider a number of other strategies such as strategic site selection of schools and intradistrict recruitment efforts that enhance diversity. See Kaufman, *supra*, at 13-18.

<sup>361</sup> See Frankenberg, *supra* note 324, at 8.

<sup>362</sup> NAT'L ACAD. OF EDUC., *supra* note 41, at 3 (noting that the research cited in the briefs in the *Parents Involved* case suggests that "although assignments made on the basis of socioeconomic status are likely to marginally reduce racial isolation and may have other benefits—none of the proposed alternatives is as effective as race-conscious policies for achieving racial diversity"); Wells & Frankenberg, *supra* note 5, at 179 (explaining that the measures suggested by Justice Kennedy in *Parents Involved* "will be far less effective without the use of race-conscious student assignment plans to balance all schools simultaneously and thus create more equality across the district"). For instance, research indicates that, when Charlotte shifted from a race-conscious to a race-neutral plan, segregation increased. See Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1558 (2003); Stephen Samuel Smith & Roslyn Arlin Mickelson, *All That Glitters Is Not Gold: School Reform in Charlotte-Mecklenburg*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 101, 108-09 (2000).

<sup>363</sup> Wells & Frankenberg, *supra* note 5, at 184; see also AMY STUART WELLS & ROBERT L. CRAIN, *STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN*

for the racial isolation and lack of diversity in the nation's schools.<sup>364</sup> Many acknowledge that these plans will not be as effective at achieving diversity and avoiding racial isolation as those that considered race directly; they recognize, however, that these plans represent a better alternative than abandoning these goals altogether.<sup>365</sup>

Student assignment plans that integrate students based upon socioeconomic status have grown in popularity over the past fifteen years, particularly since 2000, their having been adopted in approximately forty districts that educate 2.5 million students.<sup>366</sup> In reviewing the research on the impact of class integration, Richard Kahlenberg, a leading expert on public school choice, has noted that "[a] large body of research has long shown that concentrations of poverty—even more than concentrations of minority students—can impede academic achievement, and that providing all students with the chance to attend mixed-income schools can raise overall levels of achievement."<sup>367</sup> James Ryan similarly agrees that the research supports the academic benefits of class integration for low-income students.<sup>368</sup>

The school district in Wake County, North Carolina, adopted a student assignment plan that ensured that no more than 40 percent of each school's enrollees would be low-income students and that no more than 25 percent would have achievement outcomes below their grade level.<sup>369</sup> The plan accomplished this by redrawing attendance

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SCHOOLS 318–20 (1997); Jennifer J. Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 194–201 (2002); Martín Sánchez Jankowski, *The Rising Significance of Status in U.S. Race Relations*, in *THE BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS* 77, 87–90 (Michael Peter Smith & Joe R. Feagin eds., 1995); Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts 12* (2002) (The Civil Rights Project Research Paper), available at [http://www.civilrightsproject.ucla.edu/research/descg/Race\\_in\\_American\\_Public\\_Schools1.pdf](http://www.civilrightsproject.ucla.edu/research/descg/Race_in_American_Public_Schools1.pdf).

<sup>364</sup> See, e.g., Frankenberg, *supra* note 324, at 4.

<sup>365</sup> See, e.g., KAHLENBERG, *supra* note 5, at 3 ("The Supreme Court's decision to curtail the use of race was unfortunate because there is no more efficient way to produce the important goal of racially integrated schools than using race per se. It would be an enormous shame, however, if the many districts now using race in student assignment took the U.S. Supreme Court decisions invalidating voluntary race-conscious plans in Louisville and Seattle to conclude that they should give up on school integration altogether."); NAT'L ACAD. OF EDUC., *supra* note 41, at 3 (supporting race-neutral measures while acknowledging their limitations).

<sup>366</sup> See KAHLENBERG, *supra* note 5, at 3, 14.

<sup>367</sup> See *id.*

<sup>368</sup> See Ryan, *supra* note 340, at 297–98 ("Research consistently shows that introducing students from low socioeconomic backgrounds into higher-socioeconomic-status schools has a positive impact, often quite significant, on the poor students.").

<sup>369</sup> See KAHLENBERG, *supra* note 5, at 4.

boundaries for five new schools.<sup>370</sup> It successfully raised student achievement and has created racially integrated schools.<sup>371</sup> After the racial classification was abandoned under the plan, racial segregation rose, but the district has remained integrated.<sup>372</sup> Similarly, the school district in Cambridge, Massachusetts, maintained socioeconomically and racially integrated schools when it shifted from using racial classification to using a socioeconomic classification combined with parental choice to assign students to schools;<sup>373</sup> the schools have increased in racial segregation, however, since the board enacted the new policy.<sup>374</sup> Nevertheless, racial integration under the plan surpasses that under a neighborhood-residence student assignment plan.<sup>375</sup>

Some districts, such as San Francisco, California, and Charlotte-Mecklenburg, North Carolina, adopted more limited socioeconomic plans when shifting from a race-based plan to a race-neutral plan and experienced increases in racial isolation.<sup>376</sup> Scholars debate whether socioeconomic integration plans can serve as an effective approach to achieve racial integration.<sup>377</sup> Undoubtedly, further research needs to be

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<sup>370</sup> See *id.*

<sup>371</sup> See *id.* at 4, 13. All student groups in the district—white and minority, low-income and middle-class—outperform similarly situated students in districts throughout North Carolina that do not focus on socioeconomic integration. See *id.* at 13. Furthermore, in adopting the plan, some school board members and district administrators also began to realize that the prior success of the plan had been its ability to integrate students by class and achievement. They thus began to focus on ensuring that class and achievement integration became the focus of the plan, with racial integration as a beneficial byproduct but no longer the focus. See *id.* at 11.

<sup>372</sup> See Brief for the ACLU et al. as Amici Curiae Supporting Respondents at 14–15, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05–908, 05–915), 2006 WL 2927068; Frankenberg, *supra* note 324, at 11; *Impact of Race-Neutral Alternatives*, FACT SHEET (NAACP Legal Defense & Educ. Fund, Inc., New York, N.Y.), at 2 [hereinafter NAACP FACT SHEET], available at [http://www.naacpldf.org/content/pdf/voluntary/Race-Neutral\\_Alternatives\\_fact\\_sheet.pdf](http://www.naacpldf.org/content/pdf/voluntary/Race-Neutral_Alternatives_fact_sheet.pdf).

<sup>373</sup> See KAHLBERG, *supra* note 5, at 32–33.

<sup>374</sup> See Tracy Jan, *An Imbalance Grows in Cambridge Schools: Placements Based on Income, Not Race*, BOSTON GLOBE, July 23, 2007, at A1.

<sup>375</sup> See Frankenberg, *supra* note 324, at 11.

<sup>376</sup> See KAHLBERG, *supra* note 5, at 4, 41; Mickelson, *supra* note 362, at 1558; Smith & Mickelson, *supra* note 362, at 108–09; NAACP FACT SHEET, *supra* note 372, at 1 n.\*\*\* (“[M]ore than 90% of minority students in San Francisco attend schools with greater than 74% minority student enrollment, and more than 60% of minority students in San Francisco attend hypersegregated schools, with greater than 90% minority student enrollment.”); Frankenberg, *supra* note 324, at 9–10 (noting that a judge ordered the multifactor plan in San Francisco abandoned because it increased segregation in the district).

<sup>377</sup> Compare KAHLBERG, *supra* note 5, at 3, 14 (arguing that socioeconomic plans can promote racial diversity and providing guidance on how to design plans to achieve racial diversity), with NAT’L ACAD. OF EDUC., *supra* note 41, at 41 (“These researchers conclude that, although promoting diversity with respect to socioeconomic status may result in worthy and educationally beneficial ends, it is not likely to substantially reduce school segrega-

conducted on this and other race-neutral approaches.<sup>378</sup> The mixed results of and varying commentary on these plans suggest that socioeconomic integration plans will advance diversity and reduce racial isolation in some districts but not in others.<sup>379</sup> Like all race-neutral measures, the success of socioeconomic integration plans depends on the particular demographics and circumstances in the district.<sup>380</sup> Successful plans avoid piecemeal approaches by encompassing the entire district in the plan and by enabling parents to exercise choice among schools.<sup>381</sup>

School districts also may seek to promote diversity and avoid racial isolation by drawing attendance-zone boundaries so as to bring together students from a racially mixed group of neighborhoods and to address segregated housing patterns, which represent the primary cause of segregated schools.<sup>382</sup> The zones are typically designed to distribute racial groups evenly.<sup>383</sup> For instance, the school district in Rock Hill, South Carolina, chose to redraw mandatory attendance zones when it planned to open a new high school and has successfully reduced racial isolation in some schools and achieved integration in others at both the high school and elementary levels.<sup>384</sup> Also, the Berkeley Unified School District draws the attendance zones for its elementary schools to bring together a diverse mix of students from the racially and socioeconomically

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tion.”), and Gary Orfield et al., *Statement of American Social Scientists of Research on School Desegregation to the U.S. Supreme Court in Parents v. Seattle School District and Meredith v. Jefferson County*, 40 URB. REV. 96, 108, 132–33 (2008) (noting that “studies evaluating the actual implementation of socioeconomic integration plans have found that they have had mixed results in maintaining racially diverse schools,” as well as some of the disadvantages of using free and reduced-price lunch data), and Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL’Y ANALYSIS 49, 49 (2006) (finding that class integration would not create racial diversity in most large urban districts, and arguing that “in general, income integration is no guarantee of even modest racial desegregation”).

<sup>378</sup> Gary Orfield, *Response*, POVERTY & RACE, Sept.-Oct. 2001, at 5–6 (calling for further exploration of class desegregation).

<sup>379</sup> See, e.g., KAHLBERG, *supra* note 5, at 4, 13; Jan, *supra* note 374.

<sup>380</sup> NAACP FACT SHEET, *supra* note 372, at 1.

<sup>381</sup> See KAHLBERG, *supra* note 5, at 4–5.

<sup>382</sup> Stephen Samuel Smith et al., “*Your Father Works for My Father*”: Race, Class, and the Politics of Voluntarily Mandated Desegregation, 110 TEACHERS COLL. RECORD 986, 994–1006 (2008) (describing the conditions and developments that led the school district in Rock Hill, South Carolina, to adjust the boundaries of mandatory school attendance zones); Wells & Frankenberg, *supra* note 5, at 186 (recommending that districts take care “to stabilize racially integrated neighborhoods by encouraging students in those communities to attend nearby schools”).

<sup>383</sup> See Frankenberg, *supra* note 324, at 9.

<sup>384</sup> Smith et al., *supra* note 382, at 1024.



segregated neighborhoods in Berkeley, California.<sup>385</sup> From 2005 to 2006, the plan resulted in eight of the eleven elementary schools enrolling student populations within fifteen percentage points of the district-wide average of 40 percent low-income students.<sup>386</sup> Research on redrawing attendance zones to achieve diversity suggests that some districts will find this approach effective, though others may find that it has adverse effects such as destabilizing neighborhoods.<sup>387</sup>

Some districts may be able to develop magnet schools to promote diversity and avoid racial isolation. Magnet schools seek to enroll a diverse student population by developing specialized programs, such as a specialized subject matter, theme, or unique pedagogical approach that attracts students away from their private or neighborhood schools.<sup>388</sup> The National Center for Education Statistics counted 2,736 magnet schools in the United States and its jurisdictions for the 2005–2006 school year, with the highest concentrations in California, Michigan, Illinois, and New York.<sup>389</sup> Through the Magnet Schools Assistance Pro-

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<sup>385</sup> Berkeley Unified School District, BUSD Student Assignment Plan/Policy, <http://www.berkeley.net/index.php?page=student-assignment-plan> (last visited Feb. 18, 2009) [hereinafter Berkeley Student Assignment Plan]. “In the City of Berkeley, race and social class have traditionally segregated residential housing patterns.” *See id.*

<sup>386</sup> *See* KAHLENBERG, *supra* note 5, at 34.

<sup>387</sup> *See* Heeren, *supra* note 16, at 186 (noting that restructuring attendance zones “remains ineffective in racially isolated communities”); Salvatore Saporito & Deenesh Sohoni, *Coloring Outside the Lines: Racial Segregation in Public Schools and Their Attendance Boundaries*, 79 SOC. EDUC. 81, 96 (2006) (finding that white students tend to leave the public schools at higher rates when the district racially balances school attendance boundaries); Smith et al., *supra* note 382, at 1024 (finding that redrawing attendance zones in Rock Hill, South Carolina, reduced racial isolation and promoted integrated school settings); Frankenberg, *supra* note 324, at 9 (“Despite some evidence to the contrary, it is conceivable that a plan based on geographical considerations might achieve racial diversity. . . . However, evidence also demonstrates that under certain circumstances, including the pairing of adjoining neighborhoods that contain different demographic makeups, that drawing school boundary lines might destabilize pockets of racial integration within districts.”); Richard Kahlenberg, *How to Keep Brown Alive*, SLATE, June 29, 2007, <http://www.slate.com/id/2169443> (arguing that redrawing attendance zones will have little effect in a heavily segregated district); MICHAEL B. DE LEEUW ET AL., RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 11 (2007), <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN27.pdf> (noting that attendance zone planning can have a positive impact on a district because it eliminates “white enclaves” and allows parents to live anywhere in the district and know that their child will attend an integrated school).

<sup>388</sup> YUDOF ET AL., *supra* note 136, at 414; Wells & Frankenberg, *supra* note 5, at 186 (2007).

<sup>389</sup> LEE HOFFMAN & JOHN SIETSEMA, NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2005–06, at 4–5 (2007), available at <http://nces>.

gram, the U.S. Department of Education offers grants to districts to operate magnet schools for the purpose of ending, reducing, or preventing minority-group isolation.<sup>390</sup>

Researchers debate the ability of magnet schools to serve as an effective integration tool.<sup>391</sup> The U.S. Department of Education conceded in 2003 that the fifty-seven schools that received magnet school grants for the 1998–2001 cycle “overall . . . made only modest progress in reducing minority group isolation . . . .”<sup>392</sup> Only 57 percent of the grantees succeeded in preventing, eliminating, or reducing minority-group isolation, and 35 percent of the schools only reduced minority-group isolation by five percentage points or less.<sup>393</sup> Researchers have identified certain conditions that increase the likelihood of success at promoting diversity and avoiding racial isolation. To succeed, magnet schools need to use an equitable approach for selecting students and

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ed.gov/pubs2007/2007354rev.pdf. Information on magnet schools in seven states was unavailable, and twelve states reported that they either do not designate magnet schools or otherwise reported that this information was not applicable. *See id.*

<sup>390</sup> 20 U.S.C. § 7231(b)(1) (2006).

<sup>391</sup> Compare Jeffrey R. Henig, *Race and Choice in Montgomery County, Maryland, Magnet Schools*, 96 TEACHERS COLL. RECORD 729, 731 (1995) (finding that magnet schools in Montgomery County, Maryland, are more diverse than other schools in the county, but that school choice could exacerbate racial segregation in the schools), and JORDAN RICKLES ET AL., UNIVERSITY OF CALIFORNIA ALL CAMPUS CONSORTIUM ON RESEARCH FOR DIVERSITY, SCHOOL INTEGRATION AND RESIDENTIAL SEGREGATION IN CALIFORNIA: CHALLENGES FOR RACIAL EQUITY 3 (2004), available at <http://repositories.cdlib.org/ucaccord/pb/pb-002-0504> (finding that, in California, magnet schools “on average, are significantly more integrated than regular schools”), and Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 SOC. PROBS. 181, 197 (2003) (finding that magnet schools were less racially segregated than neighborhood schools), and CITIZENS COMM’N ON CIVIL RIGHTS, DIFFICULT CHOICES: DO MAGNET SCHOOLS SERVE CHILDREN IN NEED? 11 (Corrine M. Yu & William L. Taylor eds., 1997) (noting that a study of magnet schools in St. Louis, Cincinnati, and Nashville found that those schools “in all three communities . . . have been successful in creating desegregated schools”), with Lawson Bush V et al., *Magnet Schools: Desegregation or Resegregation? Students’ Voices from Inside the Walls*, 29 AM. SECONDARY EDUC. 33, 46 (2001) (finding, through interviews of students, that classes at magnet high schools remained segregated and that students of different racial groups did not interact), and Christine Rossell, *The Desegregation Efficiency of Magnet Schools*, 38 URB. AFF. REV. 697, 718 (2003) (finding that adding magnet schools to a voluntary desegregation plan does not increase interracial exposure but that it does increase white flight), and Judith B. Poppell & Sally A. Hague, *Examining Indicators to Assess the Overall Effectiveness of Magnet Schools: A Study of Magnet Schools in Jacksonville, Florida* 3 (April 12, 2001) (paper presented at the annual meeting of the Am. Educ. Research Ass’n) (“Most researchers question the effectiveness of magnet schools in meeting desegregation goals.”).

<sup>392</sup> See BRUCE CHRISTENSON ET AL., U.S. DEP’T OF EDUC., EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEES, at x (2003).

<sup>393</sup> *See id.* at xii–xiii.

ensure that families have sufficient and centralized information about the magnet schools offered in the district.<sup>394</sup> Magnet schools also need to provide effective transportation support for students attending the schools.<sup>395</sup> Also, some research suggests that magnet schools in non-Hispanic, white neighborhoods are more likely to achieve integration than those in minority neighborhoods, and that magnet schools with racially and ethnically mixed groups of minority students, involved parents, and a low student-teacher ratio are more likely to reduce racial isolation.<sup>396</sup> Finally, elementary schools and whole-school, rather than within-school, programs have been found to be more effective at preventing, eliminating, or reducing racial isolation.<sup>397</sup>

Some communities also may adopt interdistrict race-neutral approaches, such as allowing students to transfer between districts. Interdistrict approaches have been adopted in cities such as Hartford, Connecticut; Boston, Massachusetts; and St. Louis, Missouri, and have gained suburban support because of the diversity that such programs bring to white schools.<sup>398</sup> For instance, St. Louis adopted an interdistrict transfer program that allowed students from the primarily poor and African American St. Louis school district to transfer voluntarily to the white and more affluent suburbs surrounding the city.<sup>399</sup> The program has achieved considerable success.<sup>400</sup> Although eleven of the districts were almost all white when the program began, by the 1996–1997 school year (the thirteenth year of the program), fourteen of the sixteen suburban districts maintained a black enrollment of at least 15 percent.<sup>401</sup> Students who transferred to suburban schools and magnet schools graduated from high school at twice the rate of city students, and transfer students attend college at “far higher rates” than city students.<sup>402</sup> The greatest achievement gains for transfer students appeared

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<sup>394</sup> See YUDOF ET AL., *supra* note 136, at 415 (citing Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL’Y REV. 291, 299–300 (1987)); Douglas A. Archbald, *School Choice, Magnet Schools, and the Liberation Model: An Empirical Study*, 77 SOC. EDUC. 283, 304 (2004).

<sup>395</sup> Archbald, *supra* note 394, at 304.

<sup>396</sup> See CHRISTENSON ET AL., *supra* note 392, at xiii; RICKLES ET AL., *supra* note 391, at 4.

<sup>397</sup> See CHRISTENSON ET AL., *supra* note 392, at viii.

<sup>398</sup> Wells & Frankenberg, *supra* note 5, at 186.

<sup>399</sup> See WELLS & CRAIN, *supra* note 363, at 18.

<sup>400</sup> *See id.*

<sup>401</sup> *See id.*

<sup>402</sup> See William H. Freivogel, *Billion-Dollar Program Began with a Mother’s Concern for Her Son: Her Lawsuit Led to Largest School Choice Program in Country*, ST. LOUIS POST-DISPATCH, Jan. 13, 2004, Special Section, at 38; *see also* WELLS & CRAIN, *supra* note 363, at 338 (noting

in high school reading and math, while elementary transfer students have not demonstrated significant gains.<sup>403</sup> Although the program was set to end at the end of the 2008–2009 school year, in June 2007, the sixteen school districts voted unanimously to extend the program for another five years.<sup>404</sup>

A more modest approach may be found in Minneapolis, Minnesota.<sup>405</sup> There, the school district has implemented a small-scale plan that focuses on interdistrict transfers and magnet schools that resulted from the district's settlement of a lawsuit that charged Minneapolis with racial and economic segregation.<sup>406</sup> The plan has enabled approximately 2000 low-income students to attend suburban schools over the four years in which the plan has been implemented.<sup>407</sup> Those students who enrolled in suburban schools under the plan, on average, scored twenty-three percentage points higher on reading than similarly situated students who did not participate in the plan.<sup>408</sup> Although some interdistrict efforts have been successful, some question whether these approaches will prove successful in the future if districts cannot limit students' choices on the basis of race, given the influence of race on parents' decisions to select a particular school.<sup>409</sup>

Race-neutral student assignment plans undoubtedly can present numerous challenges. For example, complex plans can confuse families as to their operation.<sup>410</sup> Or, race-neutral student assignment plans may increase the distance that students must travel to school.<sup>411</sup> Furthermore, race-neutral plans undoubtedly will fail to address the multifaceted challenges that plague minority communities.<sup>412</sup>

The effectiveness of any race-neutral approach will depend on a myriad of factors, including the demographics, geography, and political will of the citizenry.<sup>413</sup> It follows that a race-neutral approach that works in one neighborhood might possibly increase segregation and destabi-

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that African American students who transferred to suburban schools showed greater academic gains than African American students in the St. Louis schools).

<sup>403</sup> See Freivogel, *supra* note 402; see also WELLS & CRAIN, *supra* note 363, at 338.

<sup>404</sup> See Paul Hampel, *Districts Vote to Extend Desegregation Program*, ST. LOUIS POST-DISPATCH, June 23, 2007, at A12.

<sup>405</sup> KAHLENBERG, *supra* note 5, at 38–39.

<sup>406</sup> See *id.*

<sup>407</sup> See *id.* at 39.

<sup>408</sup> See *id.*

<sup>409</sup> Wells & Frankenberg, *supra* note 5, at 186.

<sup>410</sup> Heeren, *supra* note 16, at 179.

<sup>411</sup> *Id.* at 186.

<sup>412</sup> *Id.* at 176.

<sup>413</sup> See, e.g., NAACP FACT SHEET, *supra* note 372, at 1.

lize housing integration in another neighborhood. Nevertheless, a race-neutral approach, as compared to inaction, will almost always promote diversity and avoid racial isolation and thus advance the antisubordination function of the Equal Protection Clause.

Now that the Supreme Court has limited the use of racial classifications, if schools are to avoid racial isolation and promote diversity, a renewed emphasis should be placed on the effective use of race-neutral efforts, as well as on research on those efforts. This will require districts to experiment with a variety of approaches to determine what race-neutral approaches work best without sacrificing other goals and interests of the district, such as respecting parental preferences and neighborhood stability.<sup>414</sup> Many districts may choose a combination of these efforts to achieve their goals.<sup>415</sup> For example, a district may draw attendance boundaries to promote socioeconomic integration. Research reveals that districts with a comprehensive approach to integration created the most integrated and racially stable schools and housing.<sup>416</sup> When this occurs, whites lose the incentive to move to white neighborhoods, and parents know that they can live in any neighborhood in the district and that their child will not be forced to attend a racially isolated school.<sup>417</sup> Thus, districts may find that adopting a comprehensive approach is necessary to accomplish their goals.

A district's adoption of a race-neutral approach can help the district provide equal educational opportunity by reducing racial isolation and its attendant harms while harnessing some of the benefits of integrated schools. This is one of the reasons that districts should be given wide latitude to adopt such approaches. Section C explains that governments also should be given wide latitude to adopt these race-neutral

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<sup>414</sup> See Frankenberg, *supra* note 324, at 8 (noting that it has been less than a decade since educators began exploring race-neutral student assignment plans).

<sup>415</sup> Reardon et al., *supra* note 377, at 68 (noting that, although income-based integration plans are not likely to lead to racial integration in most cities, a district that combined income integration with free and effective transportation to any school in the district to any student, as well as with parental choice, might be able to achieve racial integration).

<sup>416</sup> Wells & Frankenberg, *supra* note 5, at 184 (citing FRANKENBERG & LEE, *supra* note 363, at 12; Myron Orfield & Thomas Luce, Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition, and the Need for Regional Approaches 8 (May 6, 2005) (paper presented at Race and Regionalism Conference, Minneapolis, Minnesota), available at [http://www.irpumn.org/website/conference/materials/MinoritySubn\\_050605wMAPS.pdf](http://www.irpumn.org/website/conference/materials/MinoritySubn_050605wMAPS.pdf); Diana Pearce, Breaking Down the Barriers: New Evidence on the Impact of Metropolitan School Desegregation on Housing Patterns 40 (1980) (unpublished report submitted to the Nat'l Inst. of Educ.)).

<sup>417</sup> DE LEEUW ET AL., *supra* note 387, at 11.

approaches because they can avoid some of the harms and costs of using a racial classification.

### C. *The Advantages of Race-Neutral Efforts over Racial Classifications*

Justice Kennedy asserted in *Parents Involved* that race-neutral actions inflict less harm than racial classifications but did not explain the rationale for this assertion.<sup>418</sup> This section marshals arguments for why race-neutral efforts do not inflict most of the harms of racial classifications. In light of the fact that race-neutral efforts can avoid most of the harms of a racial classification while advancing equal educational opportunity, governments should enjoy wide latitude to adopt race-neutral efforts to avoid racial isolation and enhance diversity.<sup>419</sup>

#### 1. The Disadvantages of Racial Classifications

Both the Supreme Court and scholars have noted that racial classifications are disfavored for several reasons.<sup>420</sup> For example, the plurality in *Croson* explained that “[c]lassifications based on race carry a danger of stigmatic harm.”<sup>421</sup> Stigmatic harm may arise from affirmative action programs because they “cast[] a cloud” on the abilities of minorities.<sup>422</sup> In addition, Robin Lenhardt has argued that regardless of whether one is a minority, stigma may arise from a racial classification simply based upon the government’s recognition of racial difference.<sup>423</sup>

Also, racial classifications sometimes suggest that a government actor is basing decisions on stereotypes.<sup>424</sup> Kim Forde-Mazrui has provided a compelling explanation for the stereotypical assumptions that cause the Court to condemn racial classifications:

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<sup>418</sup> 127 S. Ct. at 2791–92 (Kennedy, J., concurring in part and in the judgment).

<sup>419</sup> *Id.* at 2792 (“Executive and legislative branches, which for generations now have considered these types of [race-neutral] policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”).

<sup>420</sup> See, e.g., *Croson*, 488 U.S. at 493 (plurality opinion); Campos, *supra* note 265, at 633.

<sup>421</sup> *Croson*, 488 U.S. at 493 (plurality opinion).

<sup>422</sup> Campos, *supra* note 265, at 633; see also Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 15 (2001) (“[R]ace-conscious preferences stigmatize people of color as unqualified or not deserving of selection ‘on their merits.’”).

<sup>423</sup> R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 870–71 (2004).

<sup>424</sup> See *Croson*, 488 U.S. at 510 (plurality opinion).

The stereotypical assumption potentially expressed by the [benign racial] classification is that all or most racial minorities are inferior or otherwise disadvantaged on the basis of their race itself, not necessarily because of some underlying disadvantage that correlates to race. With respect to whites, such classifications potentially send the message that whites, no matter what tangible difficulties many face, are necessarily privileged. Blacks are presumed disadvantaged to the point of deserving preferential treatment regardless of how privileged individual black beneficiaries may be, and whites are presumed advantaged regardless of the difficult circumstances many endure. Such over- and under-inclusive generalizations about blacks and whites that posit a direct relationship between race and advantage or disadvantage represent the kinds of "stereotypes" the Court condemns. By expressing this message, intentionally or not, racial classifications may cause or reinforce stereotypical thinking, which in turn leads people to treat others based on stereotypical beliefs, and furthers us from the day when race no longer matters.<sup>425</sup>

Thus, racial classifications can promote stereotypes because some believe that they fail to accurately capture the disadvantage that the classification seeks to remedy.<sup>426</sup> A racial classification also may promote stereotypes because it suggests that some cannot succeed without special consideration of a factor that does not relate to individual success.<sup>427</sup>

Racial classifications also can "promote notions of racial inferiority and lead to a politics of racial hostility."<sup>428</sup> As with the promotion of stereotypes, ideas about racial inferiority may arise, for instance, when a racial classification conveys a message that a minority needs special consideration to gain access to a benefit, such as admission to a postsecondary institution.<sup>429</sup> Racial hostility may arise because an affirmative action policy grants a preference to those who do not "need" it, such as relatively privileged minorities, and withholds the preference from those who are materially disadvantaged, such as low-income whites.<sup>430</sup>

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<sup>425</sup> Forde-Mazrui, *supra* note 35, at 2357-58.

<sup>426</sup> *See id.*

<sup>427</sup> Benjamin Baez, *The Supreme Court and Affirmative Action: Narratives About Race and Justice*, 18 ST. LOUIS U. PUB. L. REV. 413, 442 (1999).

<sup>428</sup> *Croson*, 488 U.S. at 493 (plurality opinion).

<sup>429</sup> Baez, *supra* note 427, at 442.

<sup>430</sup> *See* Forde-Mazrui, *supra* note 35, at 2357-58.

The Supreme Court has explained that racial classifications are forbidden because judging someone by his or her race undermines the worth and dignity of individuals when personal qualities and merit represent the appropriate measure.<sup>431</sup> Classifications based upon race raise concerns because the decision is based upon "an immutable characteristic which its possessors are powerless to escape or set aside."<sup>432</sup>

Justice Kennedy's opinion in *Parents Involved* echoes these concerns about the harms of racial classifications. For instance, he argues that, when a racial classification requires individuals "to march in different directions" because of their race, the classification can result in "a new divisiveness" as well as a "corrosive discourse" that results in race serving as a means of political bargaining.<sup>433</sup> Further, he questions whether racial categories are meaningful and notes that individuals lack the power to change a racial classification. He contends that "[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand."<sup>434</sup> Justice Kennedy did not contend in *Parents Involved* that race-neutral actions exist free from these potentially serious harms.<sup>435</sup> Instead, he stated that these "measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree."<sup>436</sup> Justice Kennedy did not explain, however, why race-neutral measures do not inflict the same harms.<sup>437</sup>

The Court's repeated insistence that race-neutral measures must be examined before a racial classification may be used implicitly recognizes that these measures do not involve the same harms as racial classifications. Instead, the manner in which the government's goal is pursued can substantially influence the Court's review of such efforts.<sup>438</sup> As the discussion below demonstrates, the Court has correctly implied that

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<sup>431</sup> *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); see also Holning Lau, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 HASTINGS L.J. 843, 868–69 (2008) (noting that the concurring opinions of Justices Kennedy and Thomas in *Parents Involved* indicate that "race-based essentialism is also an evil in itself that demeans individuals and, therefore, warrants heightened scrutiny").

<sup>432</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part).

<sup>433</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment).

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* (emphasis added).

<sup>437</sup> See *id.*

<sup>438</sup> See Ryan, *supra* note 69, at 343.



race-neutral government action involves fewer harms than racial classifications.

## 2. The Advantages of a Race-Neutral Approach

Race-neutral approaches may cause less harm than racial classifications for several reasons. By avoiding the consideration of race in government decisionmaking, such approaches can avoid stigmatizing minorities because they avoid calling into question the qualifications of minorities or the reasons that minorities receive special consideration.<sup>439</sup> In place of race, race-neutral actions may link more closely to the underlying concern that led the government to adopt a racial classification and thus more effectively accomplish the goal of the government action.<sup>440</sup> This link also would shift the focus away from minorities and racial status to the underlying concern, such as residential segregation.<sup>441</sup> Furthermore, focusing on a concern shared by individuals of all races, such as poverty, encourages recognition of commonalities and common interests across racial lines and conveys the suggestion that race is irrelevant.<sup>442</sup>

Race-neutral actions also may create less divisiveness when they focus on a tangible disadvantage because doing so removes the appearance that some racial minorities, such as those who are privileged, are receiving a preference when they do not warrant it, while those who warrant the privilege, disadvantaged whites for example, are denied a

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<sup>439</sup> See J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1014 (1995) ("An approach which concerns itself with disadvantaged *individuals* does not suffer the drawbacks of traditional race-based action such as injustice to dispreferred groups, stigmatization of preferred ones, and flagrant race consciousness."); Steven T. Collis, Note, *A Narrow Path to Diversity: The Constitutionality of Rezoning Plans and Strategic Site Selection of Schools After Parents Involved*, 107 MICH. L. REV. 501, 517 (2008) ("Justice Kennedy's openness to a relaxed review of siting and rezoning no doubt stems from his sense that these methods, as with changing voting district lines, do not produce stigmatization, one of his chief concerns.").

<sup>440</sup> See Heeren, *supra* note 16, at 176 (noting that class "diversity has also been shown to lead to racial diversity in schools without the negative implications many see in singling out individuals based on race"); Eboni S. Nelson, *What Price Grutter?*, 32 J.C. & U.L. 1, 9 (2005).

<sup>441</sup> See Liu, *supra* note 206, at 72 (noting that the race-neutral student assignment plan in Berkeley, California, directly responds to the residential segregation in the district).

<sup>442</sup> See Forde-Mazrui, *supra* note 35, at 2374; cf. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1194 (2008) ("Contemporary racial discourse in the United States proceeds from the assumption that both colorblindness and racial neutrality are realizable. For some, both have already been achieved, making race irrelevant.").

privilege.<sup>443</sup> By including whites as beneficiaries of race-neutral action, the hostility generated by the exclusivity of racial preferences is mitigated.<sup>444</sup> Race-neutral action avoids stereotyping minorities as always disadvantaged and in need of special assistance because it sends the message that the district is targeting the disadvantage or other neutral criteria rather than using race as a proxy for it.<sup>445</sup> By directly targeting disadvantage or other criteria, race-neutral action also avoids messages of racial inferiority that arise when a racial preference grants benefits to minorities.<sup>446</sup> Race-neutral actions also avoid decisions about which races to include and exclude as beneficiaries of a racial classification and about how to define race.<sup>447</sup>

If student assignments rely on nonracial characteristics, a person of any race may possess that characteristic, and the community may view the government action as one open to benefiting all members of society and thus inherently more fair than distributing benefits and burdens based upon race.<sup>448</sup> In a related manner, when school boards use factors such as class or geography to assign students to schools, they no longer rely on immutable characteristics, and instead rely upon factors that an individual can control.<sup>449</sup> Thus, the elimination of race as the criterion upon which the government acts avoids offending the dignity of individuals and instead can "focus on race as a structural feature of the social landscape, not as a personal attribute of an individual student."<sup>450</sup> In addition, the focus on nonracial criteria reduces the risk

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<sup>443</sup> See Forde-Mazrui, *supra* note 35, at 2371–72; see also Nelson, *supra* note 440, at 38–39.

<sup>444</sup> See Forde-Mazrui, *supra* note 35, at 2371–72; see also Nelson, *supra* note 440, at 38–39; K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 41 (1992) ("A race-neutral program . . . would be impervious to political slingshots of those who constantly play the 'race card' by stirring up the hostile sentiments of economically squeezed middle- and working-class whites against racial quotas.").

<sup>445</sup> See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1091 (1991) ("[R]ace-consciousness is self-defeating to the extent that it reinforces rather than undermines racism. Affirmative action, it is argued, may have this effect because it inevitably creates the impression of a lowering of standards in order to benefit minorities."); Forde-Mazrui, *supra* note 35, at 2371–72; Nelson, *supra* note 440, at 9 ("Race-neutral measures, such as consideration of an applicant's socioeconomic status, acknowledge these disparities and attempt to remedy them by providing educational opportunities and preferences to those students who have been adversely affected by such circumstances.").

<sup>446</sup> See Wilkinson, *supra* note 439, at 1014.

<sup>447</sup> See Carlon, *supra* note 222, at 1166–68 (discussing difficulties of drawing lines between races); Forde-Mazrui, *supra* note 35, at 2374.

<sup>448</sup> See Forde-Mazrui, *supra* note 35, at 2357–58.

<sup>449</sup> See *Bakke*, 438 U.S. at 360–61 (Brennan, J., concurring in part and in the judgment).

<sup>450</sup> Liu, *supra* note 206, at 72; see Forde-Mazrui, *supra* note 35, at 2371.

that the government seeks to achieve invidious ends because the action targets the disadvantage or other criteria rather than race.<sup>451</sup>

Given the nation's distribution of societal benefits along lines of class and geography that sometimes correspond with race,<sup>452</sup> the use of nonracial criteria, even when adopted to promote diversity and avoid racial isolation, may give greater comfort to those who find an explicit reliance on the race of individuals inconsistent with the dignity of individuals.<sup>453</sup> By focusing on criteria other than race—at least explicitly—school boards also may avoid some of the “racial exhaustion” that issues of race often encounter.<sup>454</sup>

Some racial hostility may remain if individuals feel that a characteristic was chosen simply as a proxy for race.<sup>455</sup> Hostility also may arise if members of the public believe that the government's limited time and money should not be spent to address the challenges confronting racial minorities.<sup>456</sup> Finally, some may view race-neutral efforts with hostility because they are convinced that the nation has achieved racial equality.<sup>457</sup> Ultimately, though, toleration of some lingering racial hostility may represent a necessary cost for continuing to allow and even encourage governments to address racial inequity and discrimination in American society. In this regard, it is important to remember that the Court has not suggested that governments should not continue to address discrimination and racial injustice; in fact, it has recognized that governments can take such action.<sup>458</sup> The Court's insistence that

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<sup>451</sup> See Forde-Mazrui, *supra* note 35, at 2371–72; Sullivan, *supra* note 35, at 1052 (“The more whites from lower socioeconomic backgrounds or inferior high schools swept in by the race-neutral proxy, the less salient any white applicant's claim to have suffered racial discrimination will be.”).

<sup>452</sup> See, e.g., *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

<sup>453</sup> See Ryan, *supra* note 69, at 343 (“One sees in *Grutter* and *Gratz*, and *Bakke* before them, evidence of a belief that it is better if the use of race is hidden rather than overt.”).

<sup>454</sup> See generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. (forthcoming 2009) (arguing that Americans have grown tired of confronting issues of race and racial inequalities in American society, but that history also reveals that Americans have always stressed the importance of limiting such efforts).

<sup>455</sup> See Cimino, *supra* note 133, at 1306 (“[I]f class-based preferences are perceived as a covert substitute for racial preferences, they might in fact be considered equally stigmatizing.”); Forde-Mazrui, *supra* note 35, at 2377 (noting that race-neutral plans “may still stoke resentment among whites who perceive such programs as racial favoritism by proxy”); Heeren, *supra* note 16, at 176 (“[T]he use of [socioeconomic status] as a substitute for race can be seen as a clumsy placeholder that ‘hides the ball’ by using race-neutral means to pursue racially-driven ends.”).

<sup>456</sup> See Forde-Mazrui, *supra* note 35, at 2377.

<sup>457</sup> Carbado & Harris, *supra* note 442, at 1194.

<sup>458</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against

governments first consider race-neutral measures also reveals its acceptance of race-specific goals as a legitimate government objective as well as its recognition that ignoring race and racial injustice does not represent a path to equal protection of the law and racial equality.<sup>459</sup> On balance, race-neutral action best avoids the harms of racial classifications while keeping the pursuit of racial equality on the national agenda.<sup>460</sup>

If governments are going to address racial inequality, they must identify and address the racial implications of social problems. Efforts to address racial discrimination and inequality may always confront some hostility.<sup>461</sup> Nevertheless, race-neutral efforts only allow indirect measures to address racial inequality and represent the approach least likely to cause additional harms.

#### D. *Applying Rational Basis Review to Race-Neutral Efforts to Avoid Racial Isolation and Promote Diversity*

Given the ability of race-neutral efforts to advance the provision of equal educational opportunity and to avoid many of the harms of racial classifications, school districts should enjoy wide latitude to adopt race-neutral student assignment plans. The provision of this latitude requires courts to apply rational basis review to those race-neutral plans that advance a benign purpose.<sup>462</sup> This Article contends that courts should make a threshold inquiry into the purpose and effect of race-neutral student assignment plans. When a school district can demonstrate that a plan was adopted to achieve and actually advances a benign

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minority groups in this country is an unfortunate reality, and *government is not disqualified from acting in response to it.*" (emphasis added)).

<sup>459</sup> See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) ("The Constitution is both color blind and color conscious." (quoting *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966))); *Reno*, 509 U.S. at 642 ("Despite their invocation of the ideal of a 'color-blind' Constitution, appellants appear to concede that race-conscious redistricting is not always unconstitutional." (internal citations omitted)).

<sup>460</sup> See *Forde-Mazrui*, *supra* note 35, at 2378. Of course, not just any racial goal pursued through a race-neutral approach will be upheld. See *Croson*, 488 U.S. at 498–99 (plurality opinion). In *Croson*, when the Court pointed the City of Richmond toward a race-neutral approach, it had evidence that the city sought to increase participation by minority businesses in the construction required for public projects. *Id.* Thus, the Court had evidence that the government actor was undertaking a benign race-specific goal. *Id.*

<sup>461</sup> *Forde-Mazrui*, *supra* note 35, at 2377 ("Any law motivated by a racially discriminatory purpose poses a risk of illegitimate motivations, the perpetuation of racial stereotypes, and the aggravation of race relations."); *Hutchinson*, *supra* note 454.

<sup>462</sup> *Heeren*, *supra* note 16, at 180 (contending that a race-neutral plan will be subject to rational basis review); *Winters*, *supra* note 114, at 722–23 (arguing that rational basis review would apply to a socioeconomic integration plan even if the district used class to achieve racial integration).

purpose, such as avoiding racial isolation, courts should apply rational basis review to the plan. When the plan was adopted to achieve and actually advances an invidious purpose, such as dividing students along racial lines, courts should subject the race-neutral action to strict scrutiny consistent with the Court's past precedent.<sup>463</sup>

By making a threshold inquiry into the purpose and effect of the race-neutral action and applying rational basis review only when a school district can demonstrate a benign purpose and effect, courts appropriately would continue to foreclose those actions that seek to divide the races, while providing latitude to districts to address the nation's "moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."<sup>464</sup> Under rational basis review, a court subjects the ends and the means to only a minimal level of scrutiny to ensure that the action is "rationally related to a legitimate state interest."<sup>465</sup> Rational basis review represents the determination that courts should not serve as a substantive check on government action and instead that the government's decision should almost always remain the final one.<sup>466</sup> It ac-

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<sup>463</sup> *Shaw*, 509 U.S. at 643-44 (noting the presumptive invalidity of racial classifications and that "[t]his rule applies as well to a classification is ostensibly neutral but is an obvious pretext for racial discrimination" (quoting *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1976))); *Davis*, 426 U.S. at 244-45 (holding that the Court will apply strict scrutiny to a race-neutral law if the law was adopted to accomplish a discriminatory purpose).

By allowing the application of the Equal Protection Clause to recognize the distinction between benign and invidious actions when determining the standard of review, this Article's proposed approach represents one way to effectuate the distinction Justice Breyer contends the Court has recognized throughout its case law. Justice Breyer wrote in *Parents Involved*:

The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races. From *Swann* to *Grutter*, this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together."

*Parents Involved*, 127 S. Ct. at 2834-35 (Breyer, J., dissenting) (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)). This Article seeks to operationalize recognition of the distinction between actions that bring people together and those that divide by allowing the standard of review to differ depending on which of these two different objectives is pursued.

<sup>464</sup> *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and in the judgment).

<sup>465</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>466</sup> See *id.*

compleishes this by granting substantial deference to the legislature.<sup>467</sup> The standard provides a strong presumption of legitimacy by placing the burden on the plaintiff to establish that the statute is irrational because it does not relate to a legitimate government interest.<sup>468</sup> If the court finds any set of facts that reasonably justify the government's action, the classification will be upheld.<sup>469</sup>

Some scholars have noted, however, that the Court's rational basis review includes two types of scrutiny: one in which the Court does not conduct an assessment of the statute but merely acquiesces in the legislative judgment and another in which the court conducts a limited review of the government action and requires more than the appearance of rationality.<sup>470</sup> In fact, the Court itself has admitted that its rational basis jurisprudence has been less than consistent or uniform.<sup>471</sup> Indeed, it has rarely and unpredictably invoked this more meaningful version.<sup>472</sup> This Article contends that once the threshold inquiry demonstrates that the purpose and effect of a race-neutral student assignment plan is to reduce racial isolation or enhance diversity, the more rigorous application of rational basis review appropriately provides school districts wide latitude to adopt race-neutral efforts to avoid racial isolation and increase diversity while requiring them to show more than the mere appearance of rationality.

Moreover, in *Parents Involved*, Justice Kennedy cited to a voting rights decision, *Bush v. Vera*, in support of his contention that race-

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<sup>467</sup> See *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961); see also CHEMERINSKY, *supra* note 140, at 678–79; Shaman, *supra* note 162, at 1024.

<sup>468</sup> See *McGowan*, 366 U.S. at 425–26; see also CHEMERINSKY, *supra* note 140, at 672; Shaman, *supra* note 162, at 1023.

<sup>469</sup> See *McGowan*, 366 U.S. at 426.

<sup>470</sup> See, e.g., Goldberg, *supra* note 162, at 482 (“[T]he Court’s rational basis jurisprudence wavers between its typical deference to government decisionmaking and the occasional insistence on meaningful review, without a unifying theory for meshing the two seemingly distinct approaches.” (citations omitted)); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines’ Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215, 218 (1994) (“The Supreme Court recently has applied a number of different versions of the rational basis test, which vary in the amount of deference given to the legislative classification.”); Shaman, *supra* note 162, at 1023.

<sup>471</sup> See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176–77 n.10 (1980).

<sup>472</sup> See Goldberg, *supra* note 162, at 517 (“[D]ivergent emphases [in rational basis review] reflect a persistent tension about the nature of rational basis review, which has left the doctrine with a somewhat unpredictable feel and, at times, without sufficient focus on whether a meaningful connection exists between government action and the purported justifications for that action.”); Shaman, *supra* note 162, at 1028.

neutral actions will not likely lead a court to apply strict scrutiny.<sup>473</sup> In the discussion cited in *Bush v. Vera*, the plurality makes several points that are noteworthy in determining the circumstances under which Justice Kennedy might apply strict scrutiny to a race-neutral student assignment plan. In *Bush v. Vera*, the plurality explained that strict scrutiny applies when redistricting legislation segregates individuals for voting and disregards standard districting principles; strict scrutiny does not apply, however, simply because of the legislature's mere "consciousness of race" or "to all cases of intentional creation of majority-minority districts."<sup>474</sup> Instead, strict scrutiny only applies when race was the predominant and controlling factor over other districting principles.<sup>475</sup> This suggests that the plurality viewed race as a predominant factor as sufficiently similar to the direct use of a racial classification to treat the two actions the same.

In the context of student assignment plans, this suggests that, given the Court's application of strict scrutiny to redistricting legislation that segregates the races,<sup>476</sup> the Court will likely apply strict scrutiny to a student assignment plan that seeks to segregate the races. In addition, just as strict scrutiny does not apply to the intentional creation of all majority-minority districts and instead only applies when race predominates,<sup>477</sup> strict scrutiny will not apply to a race-neutral student assignment plan with a benign purpose and instead will only be applied if the race-neutral approach is tantamount to the district using race it-

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<sup>473</sup> *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and in the judgment) (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion)). Scholars have offered various interpretations of what Justice Kennedy's reference to a voting rights opinion in *Parents Involved* and his voting rights opinions generally suggest for the constitutional future of race-neutral student assignments. See, e.g., Brown, *supra* note 14, at 744 ("Justice Kennedy's [*Parents Involved*] opinion allows school authorities to consciously attempt to produce as much integration as possible through means that eschew individual racial classifications."); Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1391 (2008) ("If Justice Kennedy intends to move general equal protection doctrine toward the approach currently underlying the redistricting cases, then equal protection law may be shifting implicitly toward a model in which the goal of integrating . . . schools . . . justifies race-conscious government action as long as the action does not rely too explicitly on race."); George La Noue & Kenneth L. Marcus, 57 CATH. U. L. REV. 991, 1013 (2008) (contending that, by invoking *Bush v. Vera* in *Parents Involved*, Justice Kennedy "suggests that only if the 'predominant' motivation of a governmental education program is racial will [the Court] require strict scrutiny review").

<sup>474</sup> *Vera*, 517 U.S. at 958.

<sup>475</sup> *Id.* at 958-59.

<sup>476</sup> See *id.* at 958.

<sup>477</sup> See *id.*

self. Therefore, this Article's proposed approach is consistent with the views expressed by Justice Kennedy in *Parents Involved*.

One might question whether, under this proposal, a court would sustain a district's furtive desire to segregate students on the basis of race, so long as the district can state a benign purpose. This scenario can be avoided in two ways. First, the threshold inquiry should examine both the purpose and effect of the student assignment plan. If a benign purpose is stated but the clear effect of the plan is racial balkanization, a court would legitimately set aside the district's statement of a benign purpose. Second, even if a limited threshold inquiry misses an invidious purpose behind a student assignment plan, a court can apply a meaningful interpretation of rational basis review to uncover the invidious purpose and any stereotyping, as the Court has done in some prior cases.<sup>478</sup> Such an application of rational basis review may appropriately be considered a heightened form of rational basis review.<sup>479</sup> The adoption of the more rigorous form of rational basis review looks beyond the stated purpose of the plan to ensure that the plan accomplishes the desired effect.<sup>480</sup> Thus, this application of rational basis review avoids the criticism that it has not evaluated the link between the government's goal and its action.<sup>481</sup> If this review revealed that the race-neutral plan increased racial isolation or decreased diversity, a court would invalidate the plan.

At a minimum, however, this review would still provide substantial latitude to school districts to adopt race-neutral student assignment plans, except when such plans serve to balkanize students along racial lines between schools rather than increase the exposure of students to those from different racial groups. When the plan has mixed effects—

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<sup>478</sup> See *supra* notes 153–159, 179–181 and accompanying text.

<sup>479</sup> See *supra* notes 153–159 and accompanying text; see also CHEMERINSKY, *supra* note 140, at 673 (“The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more ‘bite’ than the customarily very deferential rational basis review.”); TRIBE, *supra* note 182, at 1443–44 (noting that, although under the traditional application of the rational basis test the Court upholds any classification “based upon a state of facts that reasonably can be conceived to constitute a distinction,” in the 1980s the Court’s application of rational basis “sometimes took on a new, more penetrating character”); LEITMAN, *supra* note 470, at 219–22 (describing two forms of rational basis review).

<sup>480</sup> See *Romer*, 517 U.S. at 634–35; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 450 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>481</sup> Goldberg, *supra* note 162, at 490 (“[T]he deferential formulation of rational basis review can skew judicial analysis where the government appears to have acted to achieve a legitimate goal. . . . [T]he standard’s emphasis on deference . . . leads courts to skip over the required step of evaluating the link between the permissible goal and the government’s action.”).



perhaps reducing racial isolation in some schools while increasing it in others—as long as the overall effect is the reduction of racial isolation and the enhancement of diversity, courts should uphold such plans.

By applying rational basis review to race-neutral student assignment plans that advance a benign goal, courts will be deferring to the expertise of school districts in designing and implementing education policy. Judicial restraint in reviewing these plans allows the democratic process to determine the proper approach to achieve these goals.<sup>482</sup> Thus, although some scholars have criticized rational basis review for granting too much deference to the legislature,<sup>483</sup> this deference operates as an advantage in the context of a benign race-neutral student assignment plan. Admittedly, this would require courts to uphold plans that they would not themselves develop and adopt, but doing so would recognize that school districts should retain primary decision-making authority over such plans, and that the role of the courts should be limited to invalidating plans that seek and accomplish an improper purpose.

Given the racial goal behind race-neutral student assignment plans, some might contend that courts should apply a more rigorous level of review, such as strict scrutiny, to ensure that the purpose and

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<sup>482</sup> See *Schweiker*, 450 U.S. at 230 (“Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, . . . this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems.”); CHEMERINSKY, *supra* note 140, at 679; see also Archer, *supra* note 68, at 661 (“[T]here is a long line of precedent acknowledging that school administrators know better than courts what kind of learning environment is best for children and, as a result, are afforded considerable deference by the courts.”); William Benjamin Bryant, *Doubting Thomasville’s Ability-Grouping Program*: *Holton v. City of Thomasville School District*, 59 MERCER L. REV. 1391, 1406 (2008) (noting a shift from judicial remedies to legislative remedies for students seeking a high-quality education); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1693 (2004); Spann, *supra* note 222, at 634 (arguing that “the political branches of government possess the power to overcome Supreme Court impediments to racial justice,” and hoping that “they also possess the will to exercise that power”).

<sup>483</sup> See, e.g., EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 16 (2004) (“Courts will uphold laws that everybody agrees cause more harm than good, or laws that reflect outdated concerns, so long as they further, even slightly or tangentially, a legitimate goal of government.”); Goldberg, *supra* note 162, at 490 (“[T]he deferential formulation of rational basis review can skew judicial analysis where the government appears to have acted to achieve a legitimate goal. In these cases, the standard’s emphasis on deference at times leads courts to skip over the required step of evaluating the link between the permissible goal and the government’s action.”); Gunther, *supra* note 212, at 8 (noting that the rational basis standard has afforded “minimal scrutiny in theory and virtually none in fact”); see also CHEMERINSKY, *supra* note 140, at 679 (“[I]t also can be argued that the Court has gone too far in its deference under the rational basis test.”).

effect of such plans are legitimate.<sup>484</sup> If the Court took this position, it would send the signal that courts are suspicious of school districts that attempt to address the nation's legacy of racial inequality by seeking to avoid racial isolation and enhance diversity. To subject all efforts to create diverse schools and avoid racial isolation to the same exacting scrutiny that racial classifications must face would place a straightjacket on school districts that endeavor to tackle these complex issues.<sup>485</sup>

Some may criticize the application of the rational basis test to race-neutral student assignment plans that advance a benign purpose because, under rational basis review, the Court typically considers irrelevant the reasons that the legislature passed the statute; instead, the rationale for a statute "may be based on rational speculation unsupported by evidence or empirical data."<sup>486</sup> Thus, some may contend that this would enable a school board to hide a discriminatory purpose toward a particular racial group.<sup>487</sup> The more rigorous interpretation of rational basis review, however, can be applied to uncover animus toward a group and avoid this shortcoming.<sup>488</sup>

Some also have criticized rational basis review as a test that a court can manipulate to achieve a court's desired outcome.<sup>489</sup> This criticism is not unique to rational basis review.<sup>490</sup> Although one can effectively manipulate any judicial standard, once a benign purpose is shown, ju-

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<sup>484</sup> See *Croson*, 484 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."); *Bakke*, 438 U.S. at 291 (plurality opinion) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

<sup>485</sup> See *Parents Involved*, 127 S. Ct. at 2802 (Breyer, J., dissenting) ("[R]eal-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex . . .").

<sup>486</sup> *FCC v. Beach Commc'ns. Inc.*, 508 U.S. 307, 315 (1993); see also Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 908 (2005) ("The Supreme Court has repeatedly held that under the rational basis test, it is irrelevant why a particular law was *actually* passed—it only matters whether it could *theoretically* have been passed for proper purposes.").

<sup>487</sup> See, e.g., *Beach*, 508 U.S. at 315.

<sup>488</sup> See *Romer*, 517 U.S. at 634–35; *Cleburne*, 473 U.S. at 446, 450; *Moreno*, 413 U.S. at 534.

<sup>489</sup> See, e.g., Neily, *supra* note 486, at 910 ("A final indictment of the rational basis test is the Supreme Court's record of blatantly misapplying it in order to achieve preferred outcomes.").

<sup>490</sup> Scholars have criticized intermediate scrutiny for the same reason. See, e.g., George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 (1993); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 325 (1998).

dicial deference provides the appropriate judicial lens for reviewing race-neutral student assignment plans.

Some might criticize the proposed approach for providing such leeway to districts that the politically powerful could place the implementation burden of the plan on the less politically powerful group.<sup>491</sup> For example, rational basis review could allow a district to impose the transportation burden of a race-neutral student assignment plan on the minority community while white students are permitted to attend schools close to home.<sup>492</sup> Many post-*Brown* desegregation plans placed the burden of integration on minority communities, particularly the transportation burden.<sup>493</sup> A court could interpret such a burden as an intent to harm the minority community and could invalidate the plan for this reason.<sup>494</sup> A court should exercise caution, however, before taking such action and should first consider the effectiveness of alternatives to the district's approach. The existence of effective alternatives that can distribute the burden of implementation more evenly would militate in favor of finding an invidious intent. But in the absence of such alternatives, the court should defer to the school district, leaving the political process to determine whether the minority community would prefer bearing the implementation burden rather than remain in racially isolated schools.

Finally, some might criticize the proposed approach because applying rational basis to a benign student assignment plan and strict scrutiny to an invidious student assignment plan contradicts the Court's interpretation of equal protection to require applying a uniform standard to

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<sup>491</sup> See Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 206 (2005).

<sup>492</sup> See *id.*

<sup>493</sup> *Id.*

Certain specific tactics post-*Brown* reinforced patterns of racial hegemony by placing the intolerable burden of integration on African-American students. Such policies included the "freedom-of-choice" plans first used to eradicate segregation, which placed the onus on black children to voluntarily desegregate schools, and which were used to control the extent of desegregation. By 1968, the Court held that such plans were unconstitutional because they placed an undue burden on African-American students. . . . Even after the Court's ruling in *Green*, school districts continued to implement strategies to place the intolerable burden of effectuating the Court's mandate on African-American children through disproportionate transportation burdens.

*Id.*

<sup>494</sup> See, e.g., *Davis*, 426 U.S. at 239, 244-45 (holding that a showing of intentional discrimination must be made to establish racial discrimination in violation of the Equal Protection Clause).

benign or invidious government action.<sup>495</sup> The proposed approach contends that the Court should embrace some antisubordination principles when it decides the legal standard for benign race-neutral student assignment plans. An antisubordination approach guides the Court to support substantial leniency and discretion for race-neutral efforts that advance a benign purpose while strongly disfavoring race-neutral efforts that advance an invidious purpose.<sup>496</sup> Although the Court has rejected some elements of an antisubordination approach by subjecting actions that harm or benefit minorities to the same exacting scrutiny, numerous scholars have argued that an antisubordination approach informs some of the Court's current jurisprudence regarding race even while the Court subjugates the antisubordination analysis to its anticlassification analysis.<sup>497</sup>

Although this Article adopts an antisubordination framework, applying rational basis review to race-neutral efforts to avoid racial isolation and promote diversity in schools is consistent with the Court's current anticlassification approach. As discussed above, the Court's current approach to equal protection emphasizes the unconstitutionality of using a racial classification by applying strict scrutiny to all racial classifications regardless of the beneficiary of the classification.<sup>498</sup> Strict scrutiny, however, also encourages governments to adopt a race-neutral approach to achieve their goals rather than a racial classification.<sup>499</sup> Unless the Court has been encouraging governments to exchange one constitutionally suspect approach with another, its approach to strict scrutiny signals that race-neutral government actions typically will satisfy the Court's interpretation of the requirements of equal protection. This approval and even encouragement of the use of race-neutral action renders rational basis review the appropriate standard for review-

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<sup>495</sup> The plurality opinion in *Croson* stated that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." 488 U.S. at 494 (plurality opinion).

<sup>496</sup> Hutchinson, *supra* note 245, at 684 ("Under an antisubordination approach, the Court would view remedial usages of a disfavored category in a different fashion: governmental efforts to dismantle entrenched patterns of inequality and discrimination would not trigger the heightened (and fatal) sensitivity that invidious and oppressive purposes warrant.").

<sup>497</sup> See, e.g., Balkin & Siegel, *supra* note 284, at 10–11; Colker, *supra* note 245, at 1011; Hutchinson, *supra* note 245, at 646, 692–93; see also *supra* notes 294–305 and accompanying text. But see Campos, *supra* note 265, at 587–88 ("Today the antisubordination principle exists almost exclusively in scholarship, with little hope of influencing the Court.").

<sup>498</sup> See *supra* notes 189–191 and accompanying text.

<sup>499</sup> See *supra* notes 200–204 and accompanying text.

ing race-neutral student assignment plans when they pursue the benign purpose of avoiding racial isolation and promoting diversity.<sup>500</sup>

The application of strict scrutiny to invidious race-neutral student assignment plans would enable the Court to adopt this Article's proposed approach without overruling any case law.<sup>501</sup> At the same time, the application of rational basis review to benign student assignment plans would allow the Court to recognize some of the antistatutory influences within past case law<sup>502</sup> and remedy some of the shortcomings of the antistatutory approach, particularly the weakness that the antistatutory approach treats government action that harms and helps minorities under the same exacting and often fatal scrutiny.<sup>503</sup>

If the proposed approach were adopted, courts might help to reinvigorate the nation's commitment to integrated schools, equal educational opportunity, and, ultimately, the promise of *Brown*. The application of rational basis review to benign student assignment plans indicates that, as a society, such plans are desirable and thus encourages the adoption of such plans. The application of rational basis to benign plans also fosters experimentation by school districts with race-neutral student assignment plans without fear of liability if their initial efforts are not as successful as they hope. Districts need latitude to find the best approach for the communities the districts serve.

### CONCLUSION

The determination of the appropriate legal standard for race-neutral student assignment plans will shape how federal, state, and local governments approach the pursuit of racial goals for generations, not only in education but also in employment, housing, and other con-

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<sup>500</sup> See *supra* notes 462–497 and accompanying text.

<sup>501</sup> The Court has never squarely confronted the constitutionality of benign race-neutral government action. In *Davis*, the Court held that strict scrutiny applies to race-neutral government action with a discriminatory purpose. 426 U.S. at 244–45. If the Court adopted this Article's proposal, it could limit the applicability of *Davis* to those race-neutral government actions with an invidious purpose, particularly in light of its encouragement of the adoption of race-neutral action when it applies strict scrutiny by requiring governments to show that they undertook "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). At the same time, the application of rational basis to benign student assignment plans would allow the Court to recognize some of the antistatutory influences within past case law, see *supra* notes 294–305 and accompanying text, and remedy some of the shortcomings of the antistatutory approach, see *supra* notes 250–277 and accompanying text.

<sup>502</sup> See *supra* notes 294–302 and accompanying text.

<sup>503</sup> See *supra* notes 246–277 and accompanying text.

texts,<sup>504</sup> just as the Court's decision to apply strict scrutiny to racial classifications has established the legal parameters in which affirmative action programs must operate. The plurality in *Parents Involved in Community Schools v. Seattle School District No. 1* adopted a colorblind approach to the Constitution with the contention that "when it comes to using race to assign children to schools, *history will be heard*."<sup>505</sup> The history and modern-day reality of racially isolated schools within the United States reveals that those schools overwhelmingly provide minority students with inferior educational opportunities. Therefore, when determining the appropriate standard to apply to districts that take action to remedy racial isolation and promote diversity, courts should be mindful that their decisions will strongly influence not only who sits next to whom in schools across the country, but also the availability of a key mechanism to improve the quality of educational opportunities for many minority students. A decision to apply a typically "fatal in fact" legal standard to benign race-neutral efforts also would cause the nation to forfeit the educational, societal, and democratic benefits of integrated educational settings.<sup>506</sup>

This Article contends that school districts should be provided wide latitude to adopt race-neutral student assignment plans that pursue a benign purpose because these plans can avoid some of the harms of racial isolation while advancing the provision of equal educational opportunity guaranteed by the Equal Protection Clause. To determine which plans pursue a benign purpose, courts should consider both the goals and effects of the student assignment plan. Once a district has demonstrated that the plan has the goal and effect of avoiding racial isolation and enhancing diversity, courts can help to ensure that districts enjoy this wide latitude by applying rational basis to these plans. Courts should apply strict scrutiny to those plans that have the purpose or effect of balkanization. Scholars, civil rights advocates, and others criticized *Parents Involved* as the abandonment of *Brown v. Board of Education* and its vision of integrated schools and equal educational opportunity,<sup>507</sup> but this need not be the case if this Article's proposed approach were adopted.

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<sup>504</sup> Banks, *supra* note 35, at 581; Forde-Mazrui, *supra* note 35, at 2334.

<sup>505</sup> 127 S. Ct. 2738, 2767 (2007) (plurality opinion) (emphasis added).

<sup>506</sup> See *id.* at 2820–24 (Breyer, J., dissenting).

<sup>507</sup> See, e.g., David J. Hoff, *Decision Sparks Divided Reactions*, EDUC. WK., June 28, 2007, [http://www.edweek.org/ew/articles/2007/06/28/43scotusreax\\_web.h26.html](http://www.edweek.org/ew/articles/2007/06/28/43scotusreax_web.h26.html) ("School officials and traditional civil rights groups decried the U.S. Supreme Court's ruling today overturning policies intended to diversify student enrollments in the Jefferson County, Ky., and

Ultimately, courts must remember that the responses to the questions raised by race-neutral efforts to diversify schools and avoid racial isolation do not merely involve issues of legal doctrine and constitutional interpretation for scholars, judges, and school districts to ponder. The responses will also dramatically influence the nation's commitment to equal educational opportunity, an integrated society and the character of the nation that our children will inherit. Most people in this country support bringing students of different racial backgrounds together in public schools.<sup>508</sup> Therefore, the Supreme Court's decision in *Parents Involved* brings the nation to a crossroads in its history: will it continue to pursue integrated educational settings and equal educational opportunity, or will it allow the current racial resegregation of public schools to continue unabated? The road chosen will determine the character of the nation that is passed on to future generations and ultimately whether the nation continues its unfinished civil rights agenda. Therefore, the analysis of these critical issues should proceed with the circumspection, wisdom, and vision that these sensitive questions demand. The nation's schoolchildren demand no less.

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Seattle school districts."); Robert Lowe, *Backpedaling Toward Plessy*, RETHINKING SCHOOLS, Fall 2007, at 14, 17 ("Although it is not a radical step backward, the desegregation decision does further constrain the meaning of *Brown* and the meaning of public education as well."); Lynne Varner, Op-Ed., *Should Schools Be Allowed to Consider Race When Assigning Students to Its Schools?*, SEATTLE TIMES, Jan. 16, 2007, [http://seattletimes.nwsource.com/html/opinion/2003524669\\_sunlynne14.html](http://seattletimes.nwsource.com/html/opinion/2003524669_sunlynne14.html) ("[L]istening to some of the justices scrape away at the underpinnings of *Brown v. Board of Education*, the landmark decision that did away with segregated schools, I saw the 'sacred text in the American legal canon,' as *The New York Times* called *Brown*, slip away into irrelevancy."); Press Release, The Civil Rights Project, Joint Statement of Nine University-Based Civil Rights Centers on Today's Supreme Court Rulings on Voluntary School Desegregation (*McFarland v. Jefferson County Public Schools* & *Parents Involved in Community Schools v. Seattle School District No. 1*) (June, 28 2007), available at [http://www.civilrightsproject.ucla.edu/policy/court/voltint\\_joint\\_full\\_statement.php](http://www.civilrightsproject.ucla.edu/policy/court/voltint_joint_full_statement.php). ("The legacy of the widely celebrated *Brown* decision, though, has been undermined in a series of Supreme Court decisions over the past three decades which includes today's ruling.").

<sup>508</sup> See Wells and Frankenberg, *supra* note 5, at 185 ("[T]he vast majority of people in this country say they believe that children of different racial and ethnic backgrounds should go to school together.").